TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 139

ALVARO ALCORTA, PETITIONER,

vs.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED MAY 6, 1957

CERTIORARI GRANTED MAY 27, 1957

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INDEX

	Original	Print
Proceedings in the Criminal District Court No. 2 of Bexar County, Texas, in case No. S-93	1	1
Statement of facts	1	1
Appearances	1	1
Testimony of Natividad Castilleja—		
Direct	6	1
Voir dire (Mr. Barrera)	21	11
Direct (continued)	22	12
Cross	62	39
Redirect	92	59
Recross	107	68
Redirect	109	70
Testimony of Roy Barrera—		
Direct	125	71
Cross	134	77
Redirect	138	79
Recross	141	81
Testimony of Stewart Long—		
Direct	145	82
Cross	147	83
Testimony of Harry Van Slycke—		
Direct	148	84
Voir dire (Mr. Barrera)	152	86
Direct (continued)	154	88
Cross	155	89

	Original	Print
Proceedings in the Criminal District Court No. 2 of Bexar County, Texas, in case No. S-33—Continued		
Statement of facts—Continued		
Testimony of Fred A. Semaan—		
Direct	158	91
Cross	161	93
Redirect	166	96
Recross	166	96
Testimony of Pete Torres—		
Direct	168	98
Cross	178	104
Testimony of Ismael Garza—		
Direct	187	107
Cross	194	112
Ruling of Court	195	113
Approval of the Court of record	199	113
Exhibits:		
Defendant's Exhibit "A"—Letter dated January 29, 1957 from Roy R. Barrera, Ass't Criminal District Attorney, Bexar County, Texas to the Board of Pardons and Paroles	200	114
Defendant's Exhibit "B"—Affidavit of Natividad Castilleja dated January 26, 1957 but sworn to January 26, 1956	204	119
Defendant's Exhibit "C"—Affidavit of Natividad Castilleja dated January 24, 1957	205	121
Defendant's Exhibit "D"—Pencilled statement dated February 19, 1957 of Natividad Castilleja	206	124
Defendant's Exhibit "E"—Unsworn statement of Natividad Castilleja of July 20, 1955	207	124
State's Exhibit 1—Statement of facts in original trial of this case, excerpts of which follow:		

	Original	Print
Proceedings in the Criminal District Court No. 2 of Bexar County, Texas, in case No. S-93—Continued		
Statement of facts before the Criminal District Court No. 2 of Bexar County, Texas, in case No. S-54370	1	129
Appearances	1	129
Testimony of Esperanza Huron—		
Direct	78	129
Cross	84	133
Redirect	86	135
Testimony Dominga Soto—		
Direct	87	135
Cross	93	140
Testimony of Natividad Castilleja—		
Direct	94	140
Cross	118	156
Testimony of Alvaro Alcorta—		
Direct	132	157
Cross	145	165
Redirect	178	188
Recross	178	188
Judge's certificate to record	204	190
Voluntary statement of Alvaro Alcorta	204a	190
Proceedings in the Court of Criminal Appeals, State of Texas	205	196
Original application for writ of habeas corpus	205	196
Exhibit—Warrant for the execution of the death penalty	211	201
Order for hearing	217	206
Order denying writ of habeas corpus	218	206
Concurring order, Morrison, Presiding Judge	219	207
Motion for rehearing	220	208
Order overruling motion for rehearing	221	209
Clerk's certificate (omitted in printing)	222	
Order granting motion for leave to proceed in forma pauperis and petition for writ of certiorari	223	209
Order granting stay of execution	224	210

[fols. 1-5]

IN THE CRIMINAL DISTRICT COURT No. 2 OF BEXAR COUNTY, TEXAS

No. S-93

Ex Parte Alvaro Alcorta

Statement of Facts

Be It Remembered, that heretofore, to-wit, on the 21st day of February, A. D. 1957, the above entitled and numbered cause came on for hearing before the Hon. John F. Onion, Jr., Judge of said Court.

Appearances:

For the Petitioners: Fred A. Semaan, Esq., Raul Villarreal, Esq., E. P. Lipscomb, Esq.

For the State: Roy R. Barrera, Esq., Asst. Criminal District Atty.; Richard J. Woods, Esq., First Asst. Criminal District Atty.; Hubert W. Green, Jr., Esq., Criminal District Atty.

[fol. 6] Natividad Castilleja, called as a witness in behalf of the Petitioners, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Semaan:

Q. State your name, son.

A. My name is Natividad Castilleja.

Q. I want you to talk loud enough for everybody in the room to hear you. Let me change that: for the Court to hear you. If you drop your voice, he can't hear what you [fol. 7] say. Now, if I ask you a question that calls for a yes answer, I want you to say the word "yes." Don't nod your head, because this lady has to get your answer in the record. If the question asked calls for a no answer, say the word "no." Don't shake your head. Everything you say

has got to be written down, so say it loud enough for this lady and the Judge to hear you. Natividad, during her lifetime, did you know a girl or a woman by the name of Herlinda Alcorta?

A. Yes, I did.

Q. Do you know when she died, approximately?

A. On June the 19th.

Q. June 19th of what year, son?

A. '55.

Q. 1955. Now, how long before that did you know her?

A. Oh, about two or three months.

Q. All right. Where did you first meet her?

A. Well, the first time I saw her I saw her in the dance, but the first time I really got to talk to her, that was in my sister's house.

Q. Where was that dance where you first saw her?

A. Well, Los Angeles Night Club.

Q. Los Angeles Night Club?

A. Yes, sir.

Q. Is that the place run by Angel Castano?

A. That's right.

Q. All right. Who was she with at that time, if you know?

[fol. 8] A. She was alone.

Q. Do you know Alvaro Alcorta?

A. No, I didn't.

Q. Now, that's the first time you saw her, and you say the first time you met her was on another occasion. When was that?

A. Well, a few days after.

Q. All right. Where was that?

A. My sister's house.

Q. Where does your sister live?

A. Across from my house.

Q. What's that?

A. Across from where I live.

Q. Where is that?

A. 347 Harlan.

Q. With reference to the place where Herlinda Alcorta lived, where is your sister's house?

A. Well, about half a block, on Brunswick Street.

Q. All right. Well, tell us about how you met her there

at your sister's house and what conversation, if any, took place.

A. Well, we just talked about where she worked and where I was working at, and so we started talking all about that. And she told me where she was working. I told her where I was working. She told me she gets off work about 12:00 o'clock or 11:30. So I told her I was working at Woodlawn Bowling Alley.

Q. All right.

[fol. 9] A. I get off at about that same time. I was working at San Antonio Furniture and working at Woodlawn Bowling Alley.

Q. Tell me whether or not anything was said about giving her a ride home, or a ride anywhere.

A. Yes, sir. She told me, after I told her I was working out at Woodlawn, she told me if I could give her a ride.

Q. I see. What did you say?

A. I told her, "Sure." I was coming—I had to go through there.

Q. Did you ever give her a ride home from work?

A. Yes, I did.

Q. When was the first time?

A. I don't remember exactly.

Q. More or less. I'm sure you don't know the date, but approximately when was the first time you gave her a ride home from work; how long before her death, as you best remember? And if you want to put it in a matter of weeks or months, that's all right with me.

A. Month and a half, I would say.

Q. About a month and a half. Where did you pick her up?

A. Well, at Gonzales Cafe on Commerce Street.

Q. All right. Did you go by there especially to pick her up, or did you just happen to be there, or how did it happen?

A. She told me could I give her a ride and I said yes. I was going to pass through there, so I pick her up.

Q. Where were you work at that time?

[fol. 10] A. Woodlawn Bowling Alley.

Q. What time did you get off work?

A. 11:30.

Q. 11:00 o'clock. And she got off work at what time?

A. About the same time.

Q. All right. Tell me whether or not you ever had sexual intercourse with Herlinda Alcorta.

A. Yes, I did.

Q. When was the first time, son?

A. I can't remember exactly the time.

Q. Well, approximately how long after the first time you gave her a ride home?

A. The third time, I would say.

Q. About the third time. And where did that take place, that act of intercourse?

A. Well——

Q. I mean by that, was it in a room, a hotel, a house, or where?

A. In the car.

Q. In a car. In whose car?

A. My car.

Q. Where did you stop the car?

A. About three blocks from Brunswick Street, south.

Q. About three blocks south of Brunswick Street, you say?

A. That's right.

Q. In what town and what county?

A. San Antonio, Bexar County.

[fol. 11] Q. All right. Was that during the day, at night, or——

A. At night.

Q. At night. About what time?

A. Well, after—After, about 12:00 o'clock I would say.

Q. What time had you picked her up that night?

A. About 11:30.

Q. And you picked her up where?

A. Commerce Street.

Q. What part?

A. Zarzamora and Commerce.

Q. At Zarzamora and Commerce?

A. Yes.

Q. You had arranged to meet her there?

A. No, I didn't.

Q. Or was that just a chance meeting?

A. No, I didn't.

Q. You just happened to see her there?

A. Like I told you, she told me if I could give her a ride.

Q. On this occasion, the first time you had intercourse with her, you didn't pick her up at Gonzales Cafe?

A. Yes, I did.

Q. Is that at Zarzamora and Commerce?

A. Yes.

Q. Gonzales Cafe is?

A. Not on the corner, about two blocks.

Q. About two blocks?

A. Yes.

[fol. 12] Q. Why didn't you pick her up at the cafe?

A. I did pick her up at the cafe.

Q. I understood you to say a moment ago you picked her up at the corner of Zarzamora and Commerce.

A. Yes, it was on Commerce where the place is, but I had to pass Zarzamora, so I turned two blocks on Commerce. I told you first at Commerce.

Q. Just so I get it straight. Did you pick her up at the corner of Zarzamora and Commerce, or go to the Gonzales Cafe and pick her up?

A. Gonzales Cafe.

Q. From there, where did you drive to?

A. Well, where I live at, close to Brunswick, other side, about three blocks south.

Q. Now then, did you stop your car in the street, in an alley, or lot, or where?

A. In a lot.

Q. In a lot?

A. Uh, huh.

Q. You know approximately where that lot is, or by what streets it's bounded?

A. Well, it's more on Berlin and Fitch, and that area.

Q. Are you saying Berlin and Fitch?

A. Yes.

Q. And that area?

A. Yes.

[fol. 13] Q. How long after you stopped the car did you have intercourse with her, sexual intercourse with her?

A. Would you repeat that question again?

Q. You say you picked her up at Gonzales Cafe and you drove to this vacant lot that you described—

A. Uh, huh.

Q. —and stopped the car, did you?

A. Yes.

Q. How long after you stopped the car did you have sexual intercourse with Herlinda Alcorta?

A. Right away, just after we stopped there.

Q. And from there, where did you go?

A. Took her home.

Q. Took her home. Did you take her directly to her house?

A. Yes, I did.

Q. Right in front of the house?

A. Right in front.

Q. All right. Now, when is the next time you had sexual intercourse with Herlinda Alcorta?

A. Few days later.

Q. I didn't hear you.

A. Few days later.

Q. A few days later. Do you know about how many?

A. Three or four days, something like that.

Q. Where did you pick her up that time?

A. Same place.

[fol. 14] Q. Gonzales Cafe?

A. Yes.

Q. Where did you take her?

A. Well, the same area.

Q. And you had intercourse with her that time?

A. Yes, I did.

Q. Where did you go after that?

A. Took her home.

Q. All right. When is the third time you had sexual intercourse with her?

A. Oh, a few days later, two or three.

Q. Where did you pick her up?

A. Same place.

Q. Where did you take her?

A. Same area.

Q. Same area. And you had intercourse with her again —sexual intercourse?

A. Yes.

Q. Then took her home again, as I understand you?

A. Yes, I did.

Q. When was the fourth time?

A. Well, I don't remember how many times.

Q. Well, I'm sure you don't remember exactly how many times. I assume you don't; I'll put it that way. But to the best of your recollection, how many times do you think you had sexual intercourse with her?

A. Four or five times.

[fol. 15] Q. All right. Now, when was the last time you had sexual intercourse with her?

A. Well, about a week or two before she was killed.

Q. Were you with her the night she was killed?

A. Huh?

Q. Were you with her the night she was killed; were you with her the night she was killed?

A. Oh, sure.

Q. Did you have intercourse with her that night?

A. No, I didn't.

Q. Just a minute, son.

(Mr. Semaan confers with co-counsel.)

Q. Son, this is a photostatic copy of an affidavit. Would you look at it and tell me if you recognize it (hands document to witness).

Mr. Barrera: Excuse me, is the original available on that, Fred?

Mr. Semaan: Yes, here it is.

Q. (Mr. Semaan continuing:) Here, son, here is the original. (Hands document to witness) Look, son, let me save you a lot time. I want to call your attention to this part down here. Read this last paragraph.

A. (Reading document) So they asked me. All they asked me, if I had intercourse that night.

Q. I call your attention to this sentence (indicating).

A. (Looking at document)

[fol. 16] Q. Now, after having seen this, I'll ask you again whether or not you had intercourse with Herlinda Alcorta the night she died.

A. No, I didn't. I had it before, but not that night.

Mr. Barrera: Excuse me. For the purpose of the record, we would like to have the instrument, with respect to date and so forth, identified for the record.

Mr. Semaan: I intend to introduce it, Roy.

Mr. Barrera: We want to refer to it again.

Q. (Mr. Semaan continuing:) Is this your signature on this affidavit, Natividad?

A. Yes, it is.

Q. And I call your attention to this signature down here under the word "witness." Whose signature is that?

A. It's my brother.

Q. What is his name?

A. Susencio.

Q. Did he sign this as a witness?

A. Yes, he did.

Q. All right. Didn't you say—make this statement, the following statement in this affidavit: "Garza and Torres asked me if I said in my statement to Father Duffy that I had had sexual intercourse with Alcorta's wife the night she was killed." Did you say that in your statement? Let me show it to you, because I want to be fair with you. Does that say that, son? (Showing document to witness)

A. Father Duffy asked me, in the statement to Father Duffy.

[fol. 17] Mr. Barrera: Excuse me. Would you speak louder so I can hear you and hear you at the bench and bar.

Q. (Mr. Semaan continuing:) That's in the statement, is it not? I'm going to read it aloud and you correct me if I don't read it the way it is. "Garza and Torres asked me if I had said in my statement to Father Duffy that I had had sexual intercourse with Alcorta's wife the night she was killed." Is that in there? Did I read that right?

A. Yes, you read it right.

Q. See if I read the next sentence right. "The truth is just like I told Father Duffy; I did have intercourse with her that night and other nights." Is that in there, son?

A. Yes, it is in there; but——

Q. But what? I want you to say anything you want.

A. But I didn't told them that night. I told them before that night I did have intercourse, and they wrote that down.

Q. You didn't tell Father Duffy that?

A. No, I didn't told him.

Q. All right. Let's just hold this here a minute. I'll get back to it.

Mr. Barrera: Again, before we get away from the instrument, we would like to have it identified.

Mr. Semaan: I'll introduce it right now.

(Reporter marks document referred to as Defendant's Exhibit B for identification.)

Mr. Semaan: But I'm not through with it.

The Court: Are you now offering this instrument?

[fol. 18] Mr. Semaan: I didn't want——

The Court: I think the District Attorney's request was only that it be marked.

Mr. Barrera: That's right.

Mr. Semaan: Judge Ross has asked that—He's made photostatic copies of each instrument, and he has asked me not to introduce any originals. He wants them for his files. With the Court's permission, I do have a photostatic copy and I would like to mark that and introduce it.

The Court: If it is admitted in evidence, then at that time take it up with the District Attorney to see whether or not they agree to a substitution.

Mr. Semaan: All right.

Mr. Barrera: Are you introducing it or offering it for introduction at this time?

Mr. Semaan: No, not at this time. You want to look at this now? I'm about to introduce it.

Mr. Barrera: I have seen it.

Mr. Semaan: We want to introduce this.

Mr. Barrera: At this time we object to the introduction of the instrument save and except Mr. Semaan qualifies it as an instrument introduced for the purpose of impeachment, and certainly not as original evidence. I don't know what his purposes are in introducing it.

The Court: What are your purposes of introducing it, Mr. Semaan?

[fol. 19] Mr. Semaan: Certainly for the purposes of impeachment, your Honor.

The Court: It will be admitted in evidence.

(Thereupon, Defendant's Exhibit B admitted in evidence and attached hereto.)

Mr. Semaan: Does the Court want me to read it, or read it yourself?

The Court: Go ahead and read it.

Mr. Semaan: "State of Texas, County of Bexar, January 26, 1957. Before me the undersigned authority personally appeared Natividad Castilleja, who, after being by me first duly sworn, on his oath deposes and says: "My name is Natividad Castilleja. I am the same Natividad Castillega who made a statement for Father Francis Duffy concerning my testimony in the trial of Alvaro Alcorta. Yesterday around 1:30 or 2:00 p. m. two men——" Read this and let me save my voice (handing statement to Mr. Villarreal).

Mr. Barrera: May it please the Court, in the interest of time, I believe the instrument was offered in evidence. It is in evidence, very much a part of the record.

The Court: I want him to read it.

(Whereupon, Defendant's Exhibit B read aloud by Mr. Villarreal.)

Q. (Mr. Semaan continuing:) Now, Natividad, did you ever see Herlinda Alcorta in an automobile with other men, someone other than yourself?

A. Well, I think I did, yes.

[fol. 20] Q. Well, now be sure about it. I don't want you to think. Did you or not.

A. Well, like I told you, I saw a car, but maybe it wasn't a man, because they didn't park close to the house. If it had been a woman, it would have parked right in front of the house.

Q. Is that what you said in this affidavit to Father Duffy?

A. Yes, I told him that I saw that car parked.

Q. Let me show it to you, so we can be fair about it.

Mr. Barrera: Are you referring to the same statement, Fred?

Mr. Semaan: No, this is to the statement of January 24th, the first one.

Mr. Barrera: All right. Again, for the purpose of the record, we would like to have that noted down. It's another statement.

The Court: Have it identified for the purpose of the record.

Mr. Semaan: All right.

(Reporter marks document referred to as Defendant's Exhibit C for identification.)

Q. (Mr. Semaan continuing:) Now, son, I call your attention to the sixth paragraph in this statement, and I want you to look at it and read it. Read it to yourself, or out loud if you want to. Begin right here (indicating).

[fol. 21] A. "About a month before I started going out with Linda Alcorta I saw another man bring her home. He did not bring her right to her house. He dropped her off about two blocks away and she walked home from there."

Q. All right. Now, son, I'll ask you again: Did you ever see her in a car with other men, or another man?

A. No, I didn't.

Q. You didn't?

A. Well, just that time.

Q. Just this time?

A. Yes, sir.

Q. All right. Now, tell us about that time; what did you see and what did you hear?

Mr. Barrera: Just a minute. I would like to take him at this time on void dire to determine just exactly what it is he saw, whether he is just supposing or actually, in fact, did see what he purports to have said.

The Court: Go ahead.

Voir Dire Examination.

Questions by Mr. Barrera:

Q. Now, Natividad, as I understand it from this statement Mr. Semaan has had you read from of January 24, 1957, and on that occasion, referring to that occasion when you saw this car come up to the house, or stop short of the house somewhere, did you actually see a man driving the car, or did you just see her get out of a car?

[fol. 22] A. I just saw her get out of a car.

Q. If a man or woman was driving that automobile, you don't know.

A. I don't know.

Mr. Barrera: We submit, your Honor, that the further questioning of the defendant, he being the—I mean, the

further questioning of this witness with respect to that, he being a defense witness, that he is attempting to impeach him again on a statement which he already clarified to the extent he saw a car come up and did not see a man, but saw a car.

Mr. Semaan: I don't think, your Honor, by any stretch of the imagination I'm barred from cross examination and impeachment.

The Court: Not in this type of hearing. I'll overrule your objection, Mr. Barrera.

Direct Examination (Cont'd.)

Questions by Mr. Semaan:

Q. Now, Natividad, did you or not say in this first statement that you made that I took for Father Duffy—Who was present when you made this first statement? Let me bring that out.

A. Who was present at the first one?

Q. Yes, the first one.

A. Father Duffy, my brother, Alex Coy, and you.

Q. Would that be Father Francis Duffy, the Chaplain [fol. 23] at the prison at Huntsville?

A. That's right.

Q. Alex Coy, your brother, yourself and who else?

A. And you.

Q. And me. Where was that?

A. At your office.

Q. Who took you to my office?

A. Father Duffy and Alex Coy.

Q. Had you ever seen me before in your life at that time?

A. No, I hadn't.

Q. Did you not say in the affidavit you made to me in the presence of those people you have outlined that: "About a month before I stated going with Linda Alcorta I saw another man bring her home." Did you say that?

A. Well, I said it was a man in the car, but I don't know if it was a man or woman. I just thought, because they parked two blocks away.

Q. Well, son, I don't want to argue with you, and I don't want you to argue with me. We'll get through a lot

quicker if you just answer my questions. If there is some explanation you want to make, I don't want to cut you off. Answer this question: Is that in your statement or not, your affidavit? "About a month before I started going with Linda Alcorta I saw another man bring her home." Is that in there?

A. Huh?

Q. In this affidavit; are those words in there?

[fol. 24] A. Yes, they are.

Q. All right. Are these words in there: "He did not bring her right to her house. He dropped her off about two blocks away and she walked home from there." Is that in there?

A. That's right.

Q. "I saw this myself." Is that in there?

A. Yes, sir.

Q. All right. Now, is this in there. "When she got home Alvaro Alcorta was waiting for her." Is that in there?

A. That's right.

Q. All right. Is this in there: "I heard him ask where she had been." Is that in there?

A. That's right.

Q. "I heard him tell her it was too late to be out." Is that in there?

A. That's right.

Q. "I did not hear her answer to him." Is that in there?

A. That's right.

Mr. Semaan: Now, your Honor, the next sentence in this paragraph, frankly, is hearsay. I think it's admissible, but before I read it I want the Court to see it and pass on it (handing instrument to the Court). The last sentence in paragraph six.

(Conference between attorneys and the Court at the Court's bench).

[fol. 25] The Court: Of course, the rules of evidence in a case of this kind are not strictly applied, but I don't feel that would be admissible, Mr. Semaan.

Mr. Semaan: All right. That's why I showed it to the Court.

Q. (Mr. Semaan continuing:) Now, everything I did read you; those sentences I did read to you are in this statement?

A. Yes.

Q. And who is this statement signed by?

A. By me.

Q. All right. Who swore to this statement?

A. I did.

Q. Did you read this statement before you signed it, son?

A. Well, not exactly.

The Court: You are going to have to speak up loud enough for everybody at the counsel table can hear you as well as up here.

Q. Let me refresh your memory a little bit. You remember how many copies were made of this affidavit?

A. Well, there were more than four.

Q. More than four. Now, when you got through and before you signed it, state whether or not I handed you a copy.

A. Yes, sir, you did.

Q. State whether or not I handed Father Duffy a copy.

A. Yes, you did.

Q. State whether or not I handed your brother a copy.

A. Yes.

[fol. 26] Q. And state whether or not I asked you to read your original, the one I handed you.

A. Yes, you told me that.

Q. And did you read it or not?

A. Well, Father Duffy was reading it. I was following it.

Q. Father Duffy read it and you followed along. He read the copy as I understand it.

A. That's right.

Q. And you followed along with the original?

A. That's right.

Q. Father Duffy, did he read it out loud, or whisper?

A. He read the original.

Q. Oh, he read the original, this one you signed; Father Duffy did?

A. Yes.

Q. And you had a copy and you followed along as Father Duffy read out loud to you?

A. That's right.
Q. Did you hear those statements in there then?
A. Well, about bringing—Yes.
Q. And you signed it and swore to it?
A. Yes, sir.

Mr. Semaan: We want to introduce this at this time.
Mr. Barrera: We have no objection, again, for the purpose of impeachment save and except that particular [fol. 27] portion which is hearsay and which the Court has already ruled on.
The Court: It will be admitted under those conditions.

(Thereupon, Defendant's Exhibit C admitted in evidence and attached hereto.)

Mr. Barrera: May we put parenthesis around that portion, Judge?
The Court: All right.

Q. (Mr. Semaan continuing:) So, Natividad, it boils down to this: You knew Herlinda Alcorta for about a month and a half or two months before she died; is that right?
A. Yes, I did.
Q. You had intercourse with her at least five or six times, is that about right?
A. That's right.
Q. And you did make a statement that you signed and swore to, in the presence of your brother, that you had intercourse with her the night she died just before she died?
A. No, I didn't.
Q. Are you denying that you signed such a statement?
A. I signed it.
Q. All right. That's what I'm asking you. And you did sign an affidavit to the effect that you had seen her in a car with another man who dropped her off a block or two away from her home and she walked the rest of the way; you did sign such an affidavit?

[fol. 28] Mr. Barrera: May it please the Court, we object to the question as phrased, you did sign a affidavit to the effect you saw such and such. The witness has denied it. He can ask him, certainly—

Mr. Semaan: He's denying—

Mr. Barrera: Just a minute, I'm making my objection to the Court.

The Court: Let him finish the objection.

Mr. Barrera: You can ask whether or not he signed that particular affidavit, but not with the presupposed part of the question that you did sign an affidavit to the effect that you did such and such, because the witness has already denied it.

Mr. Semaan: All right. Let me put it this way:

Q. (Mr. Semaan continuing:) You did sign an affidavit, wherein you said: "I saw another man bring her home. He did not bring her right to her house. He dropped her off about two blocks away." You did sign such an affidavit?

A. I did sign it.

Q. All right. Now, you testified, Natividad, in the trial of Alvaro Alcorta, did you not?

A. Yes, sir.

Q. In the murder trial where he was tried for killing his wife?

A. Yes, sir.

Q. Let me ask you this: At the time you were going—you were having intercourse with Herlinda Alcorta, did you know whether or not she was married or single?

[fol. 29] A. She told me she was married, but she wasn't with her husband.

Q. Speak a little louder, son.

A. She told me she was married, but she told me she was not with him at that time.

Mr. Barrera: She was not with him?

A. Yes.

Mr. Barrera: All right.

Q. (Mr. Semaan continuing:) Well, son, do I understand you to say you knew she was married?

A. Well, because she told me she was.

Q. I see. Now, son, isn't it a fact that in the trial of Alvaro Alcorta you told the jury, and in response to questions by Mr. Barrera, that the extent of your association and your relations with Herlinda Alcorta was that you

met her at your sister's house and gave her a ride home on two occasions and that was all?

Mr. Barrera: Just a minute. We object to that. If the question is going to be asked referring to the record, we ask that the record itself or the specific question in the record be asked, and that the extent of your testimony, trying to sum it up——This is his witness.

The Court: I think the object is well taken, Mr. Semaan.

Mr. Semaan: All right.

Q. (Mr. Semaan continuing:) Son, what I'm showing you now is the Statement of Facts in the trial of Alvaro [fol. 30] Alcorta, in Cause Number S-54370, styled The State of Texas vs. Alvaro Alcorta, In The Criminal District Court No. 2 of Bexar County, Texas, September Term, A.D. 1955. That's what I'm reading from, son. Now, I'll call your attention to page 117 in the Statement of Facts in that case. Were you asked this question by Mr. Barrera: "Natividad, were you in love with Herlinda?" Were you asked that question?

A. Yes, I was.

Q. Did you answer: "No"?

A. Yes, I did.

Q. All right. Then were you asked this next question: "Was she in love with you?"

A. No.

Q. No, were you asked that question?

A. Yes, I was.

Q. You were. And did you answer: "No"?

A. (Witness nodded in affirmation)

Q. Were you asked this next question by Mr. Barrera: "Had you ever talked about love?"

A. Yes, I was asked.

Q. And did you answer: "No"?

A. That's right.

Q. All right.

The Court: Just a minute, Mr. Semaan. Speak up loud enough for them to hear you at the counsel table. You are lowering your voice and it is hard to hear you.

[fol. 31] Mr. Semaan: You want me to repeat the last question?

The Court: Yes, and don't shake your head in response to the questions.

Q. (Mr. Semaan continuing:) Were you asked this question, son: "Had you ever talked about love?"

A. Yes, I was asked.

Q. And did you answer: "No"?

A. Yes, I answered "No."

Q. All right. Were you asked this question by Mr. Barrera: "Had you ever had any dates with her other than to take her home?"

A. Yes.

Q. And did you answer: "No. Well, I just brought her from here to there." Did you answer that?

A. Yes, I did.

Mr. Berrera: No, no, that's not what it says there, Fred.

Mr. Semaan: You're right. Let me read that again.

Q. Answer: "No. Well, just when I brought her from there." Is that what you answered?

A. Yes.

Q. All right. Were you asked this question by Mr. Barrera: "Just when you brought her from work?"

A. That's right.

[fol. 32] Q. And did you answer: "Yes"?

A. Yes.

Q. All right. Just a minute now.

Mr. Semaan: Judge, give me just a minute. I have to search this a little.

Q. Now, son, I call your attention to page 97 of the Statement of facts in the case I just referred to. Were you asked this question by Mr. Barrera: "She's married. Now, other than the time that you saw or met Herlinda Alcorta at your sister's house, did you ever see her on other occasions?" Were you asked that question?

A. Yes.

Q. All right. And did you answer: "Well, I give her about two times, I give her a ride." Did you give that answer?

A. Yes, I did.

Q. All right. And were you asked this question: "You gave her a ride about two times?"

A. Yes.

Q. And did you answer: "Yes"?

A. Yes, sir.

Q. So you stated then that your association with her was that you met her at your sister's house and you gave her a ride home two times?

Mr. Barrera: No, sir, that is not what he stated in answer to those two questions; stating specific answers to the specific questions asked at that time.

Q. You did say you gave her a ride home two times?

A. Yes, sir.

[fol. 33] Mr. Barrera: About two times.

Q. And you said today you had intercourse with her five or six times?

A. Yes, sir. But they asked if I gave her a ride; I said yes, but from work more than——

Q. If you only gave her a ride home two times, but you had intercourse with her five or six times, on five or six different occasions, you were with her more than two times, were you not?

A. That's right. When I was asked that question I thought that he meant if I give her a ride—that I give her a ride, but not when she was working; outside of work.

Q. You mean then you picked her up then other times when she was not working?

A. Well, yes, I did. The night that that happened and once more. I say that night that it happened and one of them—one—one of the nights before.

Q. All right. So there were then, as I understand you now, other occasions when you had her in the car with you when you didn't pick her up from work, just to give her a ride home.

A. Would you ask me that question again?

Q. All right. Let me put it this way: There were other times; besides the times you say you picked her up at work and took her home, there were other times when you picked her up and went out and had intercourse with her, not just to give her a ride home, but to go have intercourse with her?

[fol. 34] A. No.

Q. Huh?

A. I just give her a ride.

Q. How many times did you give her a ride; certainly more than once wasn't it?

A. Yes, more than two.

Q. All right. But when you were asked this question in the trial of the case: "Now, other than the time that you saw or met Herlinda at your sister's house, did you ever see her on other occasions?" You understand what that means, don't you?

A. Yes.

Q. "—did you ever see her on other occasions?" Other times. You gave this answer: "Well, I give her about two times, I give her a ride." That's what you said, wasn't it?

A. Yes.

Q. The next question was: "You gave her a ride about two times?" And you answered: "Yes, sir."

A. Yes.

Q. That wasn't true, was it, Natividad?

A. Sure it was.

Q. Well, now look, son. You get me straight. Maybe I don't understand you. You know the word "occasion" means?

A. Yes, I do.

Q. All right. You were asked this question: "Now, other than the time that you saw or met Herlinda at your sister's house, did you ever see her on other occasions?"

[fol. 35] A. Yes.

Q. And you said no, just the two times that you gave her the ride. Right here, son: "Well, I give her a ride, about two times I give her a ride."

A. Well, that don't mean I was denying it.

Q. Well, the truth is you had been with her in a car more than two times; that is true, isn't it?

A. That's right.

Q. And you had picked her up and gotten her in your car on other occasions than just to give her a ride from work to the house?

That's right.

Q. And on those occasions you had intercourse with her?

A. No, I didn't.

Q. Well, you did have intercourse with her five or six times; you have said that?

A. That's when I was giving her the ride.

Mr. Barrera: Just a minute. The witness has testified he had intercourse with this girl about four or five times. Mr. Semaan has not added about five or six times.

Mr. Semaan: And he has affirmed it.

The Court: I think the record will reveal that was his original answer, Mr. Semaan.

Mr. Semaan: However, he's affirmed "five or six" several times.

[fol. 36] Mr. Barrera: Well, in answer to the leading questions we have been objecting to.

Mr. Semaan: Will the Court remind counsel for the State I think it has been agreed we can lead to a certain extent.

The Court: I think the statement was made that the rules of evidence will not be strictly applied in this cause.

Mr. Semaan: All right.

Q. (Mr. Semaan continuing:) Now, Natividad, did you tell the truth when you testified in the trial of Alvaro Alcorta?

A. Yes, I did.

Q. Did you tell anyone in the District Attorney's office about having intercourse with Herlinda Alcorta?

A. Yes, I did.

Q. Who did you tell?

A. Barrera and Torres.

Q. And you mean Roy Barrera, the gentleman sitting across the table from me?

A. That's right.

Q. And Pete Torres, sitting back there in the brown suit?

A. Yes, sir.

Q. You told both of them that?

A. Yes, I did.

Q. What advice, if any, did either one of these men give you with regard to your testimony?

[fol. 37] A. Well, I told them and they told me if I wanted to tell, I could tell. If I didn't want to, I didn't have to. But I told the truth. I was going to say it anyway, but I don't know if they meant it out of court.

Q. Just a minute, son. What did they tell you?

Mr. Barrera: We object. He asked the question and the witness is testifying. Allow the witness to answer.

The Court: Go ahead and complete your answer.

Q. You want the question repeated to you?

Mr. Semaan: Read the last question back.

(Reporter reads back the last question as follows: "What advice, if any, did either one of these men give you with regard to your testimony?")

A. Well, I told them everything.

Q. You told them about having intercourse with her?

A. Yes, I did.

Q. What did they tell you with reference to admitting or denying your having intercourse with Herlinda when you took the witness stand?

A. They told me to tell the truth.

Q. What else did they tell you, if anything?

A. Told me if I didn't want to say it, I didn't have to, but they didn't tell me to deny it in court. Told me to tell the truth and I did.

Q. Who told you that if you didn't want to admit it, you didn't have to?

[fol. 38] A. Well, they did.

Q. Well, who is they?

A. Well, Roy Barrera and Pete Torres.

Q. All right. Now, had they not old you that, that if you didn't want to admit it, you didn't have to, would you have admitted it in the trial of Alvaro Alcorta; would you have told about having intercourse with her?

A. Sure, I would have.

Q. And I take it, then, the reason you denied it was because they told you that you didn't have to admit it.

A. I didn't deny it.

Q. You didn't deny it?

A. (No response)

Q. You didn't deny it?

A. I didn't.

Q. Are you saying you said in the trial of that case you had intercourse with her?

A. They didn't ask me.

Q. You do remember being asked this question by Mr. Barrera: "Now, other than the time that you saw or met Herlinda Alcorta at your sister's house, did you ever see

her on other occasions?" You were asked that, weren't you?

A. Would you repeat it again?

Q. Yet me show it to you, son (showing document to the witness). This question here (indicating). You were asked [fol. 39] this by Mr. Barrera: "She's married. Now, other than the time that you saw or met Herlinda Alcorta at your sister's house, did you ever see her on other occasions." You were asked that question?

A. Yes, I was.

Q. And you said: "Well, I give her about two times, I give her a ride."

A. Well, I did.

Q. You didn't volunteer anything there about I had seen her five or six times and had intercourse with her.

A. Well, I didn't because they didn't ask me that.

Q. Well, was it because they didn't ask you, or because Mr. Barrera suggested to you that if you don't want to tell it, you don't have to?

A. He told me not to volunteer anything they didn't ask me.

Q. They told you not to volunteer?

A. That's right.

Q. And that's why you didn't say it?

A. Well, because they didn't ask me.

Q. Because they didn't ask you. Isn't it a fact that Mr. Barrera, himself, on direct examination, before the State had rested and the defense began putting on testimony, asked you these questions, on page 117: "Were you in love with Herlinda?" And you answered: "No."

Mr. Barrera: May it please the Court, this is repetitions. That is in the record. The witness has already stated he [fol. 40] was asked those questions and the answers he gave thereto.

The Court: I'll overrule your objection.

Q. All right. Were you not asked that by Mr. Barrera on direct examination?

A. I was.

Q. And you answered: "No."

A. That's right.

Q. And were you not asked: "Was she in love with you?" Mr. Barrera asked that?

A. That's right.

Q. And you answered: "No." Is that right, you answered: "No"?

A. That's right.

Q. All right. And weren't you asked the further question "Had you ever talked about love?"

A. He asked me that.

Q. Mr. Barrera did?

A. Yes.

Q. And you answered: "No."

A. Yes.

Q. And were you not asked this further question by Mr. Barrera: "Had you ever had any dates with her other than to take her home?".

A. That's right.

Q. And you answered: "No." And you had told——

Mr. Barrera: Just a minute. Complete his whole answer there, Mr. Semaan, for the record.

[fol. 41] Mr. Semaan: All right, Mr. Barrera.

Q. Let's complete your answer. The last question was, by Mr. Barrera: "Had you ever had any other dates with her?"

Mr. Barrera: No, no, not "any other dates."

Q. "Had you ever——"

Mr. Semaan: You read it, Mr. Barrera.

Mr. Barrera: You are purporting to read it. I want you to read it as it is.

Mr. Semaan: Watch me closely; I don't want to make a mistake on purpose.

The Court: That's just the thing I warned you about.

Mr. Semaan: All right.

Q. (Mr. Semaan continuing:) "Had you ever had any dates with her other than to take her home?" You were asked that by Mr. Barrera?

A. I was.

Q. And you answered: "No. Well, just when I brought her from there."

A. That's right. I answered that.

Q. Son, you had in the meantime or beforehand, before these questions were asked you by Mr. Barrera; told Mr. Barrera that you had intercourse with this girl several times, had you not?

A. Yes, I had.

[fol. 42] Q. And you told Mr. Torres that, too?

A. Yes, I told him.

Q. And you understood the questions that were asked you in that courtroom?

A. I did.

Q. And you realized the meaning of your answers when you gave them?

A. Yes, I did.

Q. Now, son, I'm going to call your attention to page 119 of the Statement of Facts. On page 119, that's shortly after Mr. Barrera asked you those questions and then he passed you over to Mr. Lipscomb, the defendant's attorney, and this is Mr. Lipscomb talking to you. Now, did he ask you this question: "You never did see Herlinda with another boy, anybody except you?" You remember being asked that?

A. Yes.

Q. And wasn't your answer as follows: "No, I didn't."

A. Well, I answered that.

Q. That's what you said?

A. That's what I said.

Q. Now, son, you know Alvaro Alcorta now when you see him, don't you?

A. Yes, sir.

Q. And you saw him there in the trial?

A. Yes, sir.

Q. In his trial?

A. Yes, I did.

[fol. 43] Q. Isn't it a fact that you had seen Herlinda Alcorta at dances with men?

A. No, I didn't see her with men.

Q. Well, with boys?

A. I never seen her with one, but I mean I seen her dancing, but that doesn't mean she was with one.

Q. But you did see her dancing with a male, in spite of his age. You know what the word "male" means?

A. Yes.

Q. You did see her with a male at a dance, dancing with a male, did you not?

A. Well, yes.

Q. All right. And you have identified statements, affidavits, that you have made wherein you said you saw her in a car with a man—get out of a car with a man a block or two away from the house.

Mr. Barrera: We object to that. We ask that the affidavit, first of all, be identified so we will know which one he is talking about, and, second, that he be asked whether or not he signed an affidavit, as to the contents of it. There is a question——

The Court: The objection is well taken, for the purpose of the record, Mr. Semaan.

Q. (Mr. Semaan continuing:) Son, I call your attention now to Defendant's Exhibit C. For your information, son, that is the first statement you made to Father Duffy.

A. That's right.

[fol. 44] Q. Now, I call your attention to that question by Mr. Lipscomb, whether or not you had seen her with other boys or—Get page 119. Let me get it straight. Now, this question again by Mr. Lipscomb: "You never did see Herlinda with any other boy, anybody except you?" You were asked that by Mr. Lipscomb?

A. Yes, sir.

Q. And you have identified this statement, Defendant's Exhibit C, as having been made and signed and sworn to by you?

Q. All right. Now, Natividad, why didn't you say in court, in the trial of Alvaro Alcorta, why didn't you tell about all these acts of intercourse you had with her?

A. Why didn't I say it? Well, I wasn't asked.

Q. Is that your only reason?

A. Well, yes, because they told me not to volunteer. I wasn't going to volunteer anything they didn't ask me.

Q. Not to volunteer about what; did they tell you?

A. Well, about that intercourse.

Q. All right. And had you not been told not to volunteer about that, would you have told about it?

Mr. Barrera: Just a minute. That would certainly call for a conclusion as to whether he would have said anything about anything if he was not asked about it.

[fol. 45] Mr. Semaan: It wouldn't call for a conclusion; it would call for a reason for giving an answer.

Mr. Barrera: It certainly would. It goes to the entire area of speculation, what else would he have testified to if he had not been told not to volunteer.

The Court: I'll overrule your objection.

Mr. Semaan: Read my question back.

(Reporter reads back last question as follows: "And had you not been told not to volunteer about that would you have told about it?")

A. If they would have asked me, yes.

Q. Sir, that's not the question I asked you. I said, had you not been told; if Barrera or Torres, either one or both, had not told you that you didn't have to tell that, would you have told it?

Mr. Barrera: Just a minute. Again, we object to that as certainly being misleading as to this witness; not being told that he could say that where?

Mr. Semaan: In court, in the trial of Alvaro Alcorta.

Mr. Barrera: Well, ask the question.

Q. (Mr. Semaan continuing:) Had Barrera or Torres not told you that when you testified as a witness in the Alcorta trial that you didn't have to volunteer that and that you didn't have to say it unless you wanted to——

A. No, I would tell the truth.

[fol. 46] Mr. Barrera: We object to that as being a double barreled question, did not have to volunteer and did not have to say that. That is certainly double barreled.

The Court: Rephrase your question.

Mr. Semaan: All right.

Q. Had you not been told by Roy Barrera or Pete Torres that when you took the stand and testified against Alvaro Alcorta you did not have to volunteer that information about sexual relations with Herlinda Alcorta, would you have told about it?

A. Yes.

Q. You would have. Now, son, you remember the oath you took when you testified in that trial, in Alcorta's trial?

A. Yes, sir.

Q. What was that oath?

A. Well, to tell the truth, the whole truth and nothing but the truth.

Q. Tell the truth?

A. The whole truth.

Q. The Whole truth?

A. And nothing but the truth.

Q. And nothing but the truth. Did you tell the whole truth in your testimony?

A. Well, I did, the way they asked me.

Q. The way they asked you. And that's why you testified as you did, because of the way they asked you?

A. That's right.

[fol. 47] Q. And because of the advice given to you by Mr. Barrera and Mr. Torres?

A. Well, yes.

Q. All right.

Mr. Semaan: Roy, do you have a copy or the original affidavit that you all took from this man? Let me see it. (Counsel for State hands document to Mr. Semaan.) Your Honor, give me a few minues to read these three pages.

The Court: All right.

(Conference between attorneys and the Court at the Court's bench.)

Q. (Mr. Semaan continuing:) Now, Natividad,——

The Court: Just a minute, Mr. Semaan.

Mr. Semaan: Yes, sir.

The Court: Everyone remain in their seats now. Keep your seats.

(Alvaro Alcorta is escorted from the courtroom.)

The Court: The Court will stand in recess for minutes.

(Thereupon, the Court took a short recess, at the conclusion of which the following proceedings were had:)

Q. (Mr. Semaan continuing:) Now, son, I call your attion to page 99 in the Statement of Facts in the trial of Alvaro Alcorta. Strike that. Were you ever in a car alone; just you and Herlinda when you picked her up?

[fol. 48] A. Yes.

Q. About how many times, son?

A. Well, a few times; I don't remember how many.

Q. You were by yourself in a car and you saw her and picked her up?

A. Well, not exactly. I picked her up.

Q. Well, how?

A. Well, when I picked her up, that was from her job.

Q. Well, were you alone?

A. No.

Q. You were always with somebody?

A. Well, not always, but a few times I picked her up, yes.

Q. You were alone?

A. No, not alone, with another boy.

Q. Was there any time you picked her up when you were alone?

A. No, just that time that that happened, that night she was killed.

Q. All right. Let's get back to the original proposition. You have admitted on one occasion four or five acts of intercourse with Herlinda Alcorta, is that right?

A. That's right.

Q. And on other occasions, five or six acts of intercourse with Herlinda Alcorta?

A. That's right.

Q. And you have made the further statement that you don't know exactly how many times you had intercourse with her, but there were several.

[fol. 49] A. There were several.

Q. Well, now, was there ever any occasion when you picked up Herlinda Alcorta where you were by yourself in the car; you either saw her on the street, or at work, or wherever it was and picked her up and took her out?

A. No.

Q. There was always someone with you?

A. Oh, yes.

Q. Who?

A. Well, when I picked her up off her job, Mateo Guerra.

Q. I'm not talking about one time. I'm talking about any time you picked her up. Were there times when just you, by yourself, and you picked her up and took her wherever you took her?

A. No.

Q. You are positive of that?

A. Yes.

Q. Then, on every time, every occasion when you picked her up and eventually had intercourse with her, whether it was four or five or six or more or less, there was always somebody with you when you first picked her up and got her in the car with you?

A. Yes.

Q. Son, you stated awhile ago that you were not sure, on this occasion when you say you saw a car stop a block or two away from Merlinda's house and she got out of the car; you said you were not sure whether it was a man or [fol. 50] woman or who it was that dropped her off. Didn't you say that?

A. That's right.

Q. I want to show you this piece of paper, son, and ask you if you can identify it. You know what that is?

A. Yes, sir, I know what it is.

Q. Is there writing on this paper?

A. That's right.

Q. Who wrote that?

A. I did.

Q. Is that in your own handwriting?

A. That's right.

Q. Is it signed?

A. It is.

Q. Who is it signed by?

A. By me.

Q. All right. Are there any other signatures on that?

A. Yours and——

Q. You want me to read it for you?

A. Yes, I guess so.

Q. Would that be "Raul Villarreal"?

A. Oh, yes.

Q. Would that be "F. J. Baskin"?

Mr. Barrera: Excuse me. For the record, identify Raul Villarreal.

Mr. Semaan: Raul Villarreal is the attorney in this case sitting there beside me. And for the record, F. J. [fol. 51] Baskin is an attorney, a member of the San Antonio Bar, who has nothing to do with this case.

Q. (Mr. Semaan continuing:) Where was that made and signed?

A. At your office.

Q. Were there any other men present in my office other than you, me, Raul Villarreal and F. J. Baskin?

A. Well, there were two, but I didn't know their names.

Q. Now, you wrote this and you signed it in your own hand?

A. Yes, I did.

Q. Did anybody twist your arm or scarce you?

A. No.

Q. Or force you to write it?

A. No.

Mr. Semaan: Mark this, please.

(Reporter marks instrument referred to as Defendant's Exhibit D for identification.)

Q. Son, I want you to read it from the top to the bottom. Begin with the date, and the signature. Don't read this (indicating); that's the stamp the reporter put on it.

A. "February 19, 1957"——

Mr. Barrera: Just a minute. We are going to object to it being read outloud and into the record until such time as we have had an opportunity to examine it and until such time, further, as it is introduced.

Mr. Semaan: There it is, Roy (handing instrument to counsel for the State).

[fol. 52] Mr. Barrera: I'm making my objections for the record, Fred.

(Counsel for the State examines instrument and returns same to Mr. Semaan.)

Mr. Barrera: All right.

Q. (Mr. Semaan continuing:) Begin at the top, son, the date, and go all the way to the bottom.

A. "February 19, 1957. If Roy Barrear hadn't told me that I didn't have to say—to admit I had intercourse with Herlinda"——

Q. Son, didn't you put a word in there that isn't in there? Start over and read it slow. You want me to read it, and you watch me and see if I read it right?

Mr. Barrera: Mr. Semaan, you are introducing that, is that correct?

Mr. Semaan: Yes.

Mr. Barrera: Again, we ask it be limited, for the purposes of the record, of impeachment only.

Mr. Semaan: That's right.

The Court: You are offering it at this time?

Mr. Semaan: That's right.

The Court: You have no objections, other than as stated?

Mr. Barrera: That's right.

The Court: It will be admitted in evidence.

[fol. 53] (Thereupon, Defendant's Exhibit D admitted in evidence and attached hereto.)

Q. (Mr. Semaan continuing:) You watch me and see if I read it correctly. "February 19, 1957. If Roy Barrera had not told me that I did not have to admit I had"—After the words "I had" there is "e-s" or "e-n"; what is that supposed to be?

A. I don't know.

Q. The next word is—"intercourse with Herlinda, I would have told the truth and told the jury how many times I had intercourse with Herlinda." Paragraph. "I had seen Herlinda in a car with other men, a man"—Not "men" but "man" singular. —"but I told the jury that I had not seen her with other"— I don't know whether that is "man" or "men," one of the two. Signed: "Natividad Castilleja."

A. That's right.

Q. Witness: "Fred A. Semaan." The word "witness" is not in there. "Fred A. Semaan, Raul Villarreal, F. J. Baskin."

A. That's right.

Q. That's all in there?

A. That's right.
Q. And that's your hand?
A. That's right.
Q. And you wrote that?
A. That's right.
Q. Now, son, you wrote this in my office, you say?
A. Yes, I did.
Q. What did you come to my office for?
A. What did I come to the office for?
[fol. 54] Q. Uh, huh.
A. Well, same reason that guys went up to my house.
Q. What's that?
A. Coy went to my house. He told me that he wanted me to tell.
Q. I mean on this date, February 19th; that was day before yesterday. Why did you come to my office?
A. Why did I went to your office?
Q. Yes.
A. Well, to see you, of course.
Q. And what did you tell me you wanted to see me about?
A. Well, that Herlinda's father went to my home.
Q. That's Herlinda Alcorta's father?
A. That's right.
Q. Went where?
A. To my house.
Q. And what did he tell you?
A. That Roy Barrera wanted to talk to me.
Q. And wanted you to do what?
A. Just talk to him.
Q. Go see Roy Barrera?
A. Yes.
Q. You remember my asking you then whether or not you had talked to Roy Barrera?
A. That's right.
Q. You remember my asking you whether or not everything you told me in the statements you had made were true?
[fol. 55] A. That's right.
Q. You remember my asking you to write out in your own hand what the truth was?
A. Well, yes.

Q. And then you wrote this?
A. Yes, but you didn't let me——
Q. What, son?
A. Didn't put the rest on there.
Q. What did you say?
A. Didn't put the rest on.
Q. Rest of what?
A. I was going to say I didn't told the truth because they didn't ask me. Over here I wasn't sure.
Q. Is that what you want to say now?
A. Yes.
Q. Did anybody tell you not to say that then?
A. Well, the way I told it to you.

Mr. Barrera: Just a minute, for the purpose of the record, he says over here he said that because of that, and over here I said this othere, but I wasn't sure. I would like to have that identified for the record as to what he means. Take that statement again, Natividad, and tell us when you said, "Over here"——

Mr. Semaan: Is that all right with the Court?

The Court: Yes.

Mr. Barrera: "Over here I wasn't sure." What did you mean by that?

[fol. 56] A. Well, when I told him I would have told the truth if they hadn't tell me, I had intercourse with Herlinda; I would have told the truth if they would have asked me.

Q. (Mr. Semaan continuing:) Well, why didn't you write that in there? You wrote it, son.

A. Yes, I wrote it, but you said that was enough. I was going to write it.

Q. Did I tell you it was enough?

A. When I got through, that I have seen Herlinda with another man, you told me to put that down, and you said that was enough.

Q. You're positive I told you that was enough, not to say any mor?

A. That's right.

Q. But you do admit those two men, beside me, were present?

A. That's right.
Q. And two other men were in there at the same time?
A. That's right.
Q. Do you know Pat Henley?
A. No, I don't.
Q. Do you know my brother, A. A. Semaan?
A. No, I don't. I have seen him, but I don't know him.
Q. Was he there then?
A. Yes.
Q. We'll get that later. This is your handwriting?
A. Yes.
Q. You wrote it yourself?
A. I did.
[fol. 57] Q. Then you signed it yourself?
A. I did.
Q. Natividad, the night that Herlinda was killed, tell me whether or not Herlinda Alcorta told you that a truck driver was supposed to pick her up, but he didn't show up, and so then you piked her up and took her home?
A. You want me to answer if——
Q. Did she tell you that or not?
A. No, she didn't.
Q. She didn't tell you that?
A. No, she didn't.
Q. Did you sign a statement to that effect?
A. No, I didn't.
Q. And swear to it?
A. No, I didn't.

(Mr. Semaan confers with co-counsel.)

Mr. Semaan: Let me skip that question and go to another while Mr. Villarreal is finding whatever it is.

Q. Natividad, I'll show you this three-page instrument and ask you if you recognize it.
A. Yes.
Q. What is that?
A. Well, this statement that I made.
Q. This is a statement that you made to who?
A. Pete Torres.
Q. To Pete Torres. Pete Torres, a member of the Bexar
[fol. 58] County District Attorney's Office?

A. That's right.

Q. He's an investigator?

A. That's right.

Q. Where did you make this statement?

A. Here in court, his office I guess, the D. A.'s office.

Q. In the D. A.'s office. That would be the District Attorney's office?

A. That's right.

Q. Who was present when you made this statement?

A. Pete Torres and Roy Barrera.

Q. All right. And you signed this statement; that is your signature there?

A. That's right.

Q. On all three pages?

A. That's right.

Q. And you swore to it?

A. That's right.

Q. Now, read this statement over and look it over carefully and tell me whether or not anywhere in there it says you had intercourse with Herlinda Alcorta, either, once, five, six, or more times, or less; if there is anything in there at all about your having intercourse with her.

Mr. Barrera: For the sake of time, we'll stipulate there is nothing in that statement indicating that.

[fol. 59] Mr. Semaan: It's all right with me.

Q. There's nothing in there about that, is there?

A. No, sir.

Q. When you made this statement, before you signed it, you did tell Mr. Torres, Pete Torres, in the presence of Roy Barrera, that you had had intercourse with Herlinda Alcorta?

A. Yes, I did.

Q. Why was it not put in here, do you know?

A. No, I don't.

Q. Now, on the last page, the last sentence and paragraph reads as follows: "I have given the above statement freely and voluntarily to Pete N. Torres; I have read it and it is true and correct to the best of my knowledge and belief. End of statement. Nothing follows." Then the signature and you swore to it. Is that right?

A. That's right.

Q. But that wasn't true, was it, Natividad?
A. I told them.
Q. You told them, but they didn't put it in there?
A. That's right.

Mr. Semaan: Mark this, please.

(Reporter marks instrument referred to as Defendant's Exhibit E for identification.)

Mr. Semaan: Can I introduce this, or do you have a copy?

Mr. Barrera: That is the original and we sent that up to Mr. Ross. I will say this, Fred; We intend to make [fol. 60] photostatic copies of it for this so Mr. Ross can take it back.

Mr. Semaan: Can it be agreed and understood that a photostatic copy of this will be made?

The Court: Mr. Barrera, you have no objection to this statement marked Defendant's Exhibit E?

Mr. Barrera: No.

The Court: It will be admitted into evidence.

Mr. Barrera: We do have this one observation, which was made with respect to the other statements, that that would be limited again to impeachment.

Mr. Semaan: No, I'm not offering that for impeachment only.

The Court: For what purpose are you offering it?

Mr. Semaan: For the reason evidence was suppressed. When the man made this statement to the District Attorney's office long before the trial, on July 20th of 1955, that the witness told the investigator and the Asssistant District Attorney of his conduct and intercourse with the deceased, and it was not put in the statement.

Mr. Barrera: Again, we refer to the admissibility of such statement. The witness may well have given us any other amounts of information with respect to the misconduct of one or other participants in the case, which in and of itself would not make it admissible, and not be presumed, because it was not in the statement here, there was a presumption then of suppression of evidence or legal suppression of evidence. There is such a thing as suppression of illegal [fol. 61] testimony.

Mr. Semaan: Not by an attorney or investigator or anyone else.

The Court: We are getting off the point here, gentlemen. I'm going to admit it into evidence.

(Thereupon, Defendant's Exhibit E admitted in evidence and attached hereto.)

Q. (Mr. Semaan continuing:) Natividad, you were mixed up in a murder across the street from Mission Baseball Park here in San Antonio some time before Alvaro Alcorta was tried for the murder of his wife, were you not?

A: That's right.

Q. Did you ever discuss that case with the District Attorney, or any member of the District Attorney's staff discuss it with you

A. When, after the——

Q. Did anybody from the District Attorney's office, including the District Attorney on down, ever mention that murder across the street from Mission Baseball Stadium with you?

A. No.

Q. They never talked to you about that case at all?

A. You mean when they asked me about this?

Q. No, at any time.

A. Yes, they asked me, yes.

Q. You have discussed that murder with them?

A. Yes, I did.

[fol. 62] Q. You were present with the man that did the killing that killed somebody else?

A. Yes.

Q. You were right there with him?

A. No.

Q. No charges have been filed against you of any kind growing out of the killing of a boy across from Mission Baseball Park?

A. That's right.

Mr. Semaan: That's all. Pass the witness.

Cross examination.

Questions by Mr. Barrera:

Q. Natividad, how long after the trial of the Alvaro Alcorta case did this case happen over at Mission Park? Approximately how long?

A. Well, I guess the 4th of July.

Q. The 4th of July?

A. That's right.

Q. Was that the 4th of July of 1955?

A. That's right.

Q. Or the 4th of July of 1956?

A. '55.

Q. Of '55 or '56?

A. '55.

[fol. 63] Q. Well, in any event, had such a case occurred at the time that you testified in the Alvaro Alcorta case? In other words, had that other killing taken place over here at the ball park before the Alcorta case?

A. No.

Q. Or after?

A. That happened before the trial.

Q. What happened before the trial?

A. That stabbing over there.

Q. The stabbing?

A. Yes.

Q. I see. Did you testify in the Alvaro Alcorta case merely because you were a witness in the other shooting, or because you were asked to testify in the case as to what you knew about the Alvaro Alcorta case?

A. As a witness.

Q. As a witness. Now, on this other case, did you ever go before the Grand Jury; were you ever filed on for anything?

A. No.

Q. Did you take any active participation in the fight and killing that resulted over there?

A. If I took any——

Q. Did you fight with anybody there that night?

A. Yes, I did.

Q. Did you know a man was going to be killed?

A. No, I didn't.

Q. Did you intend to kill anybody?

[fol. 64] A. No, sir.

Q. Did you fight with the man that was stabbed?

A. Yes, I did.

Q. Before or after he was stabbed?

A. Before.

Q. I see. Now, Natividad, you went up to Mr. Semaan any number of times and you made any number of statements to him; is that correct?

A. That's right.

Mr. Semaan: Your Honor, I'm going to ask that the questions by the District Attorney be put in the form of a question, not in a statement which he asks the witness to affirm.

Mr. Barrera: It's a defense witness.

Mr. Semaan: This is everybody's witness.

The Court: Rephrase your question.

Mr. Barrera: All right.

Mr. Semaan: The point is I don't want him making a statement and asking for an affirmance.

Q. (Mr. Barrera continuing:) Now, you have identified this st..ement here, Natividad, taken on February 19th, or dated February 19, 1957, identified and introduced as Defendant's Exhibit D. You made that statement there in Mr. Semaan's office, is that correct?

A. Yes, sir.

[fol. 65] Q. That is on February the 19th?

A. That's right.

Q. And you also went up to Mr. Semaan's office on January 26th of 1956 and you gave him another statement, is that correct? That one has been identified as Defendant's Exhibit B. You identified that statement awhile ago, didn't you?

A. (Witness nodded in affirmation)

Q. And you also gave a statement to Mr. Semaan on January 24th of 1957 which has been identified as Defendant's Exhibit C; is that correct?

A. That's right.

Q. So, taking them in the order in which they are dated, you gave him one on the 24th day of January of 1957, in

which, at the bottom—Now, this is purporting to be you talking about your conversation with Mr. Semaan which is in the statement here: "I want to say that Fred A. Semaan, before he took this statement from me, told me he wanted the truth. He told me he did not care who was hurt so long as I told the truth and he told me further he did not want me to say one word that was not true."

A. Yes.

Q. "He told me that in fairness to Alvaro Alcorta he wanted all the truth." Is that correct?

A. Yes.

Q. Now, at the time that you gave this statement to Mr. Semaan on January 24th, did you tell him in there that you had had intercourse with Herlinda Alcorta on the night [fol. 66] of the killing?

A. No, I didn't.

Q. I want you to read it, unless you know its contents.

Mr. Barrera: Fred, for the sake of time, we can get stipulations about his having said he had intercourse with Herlinda on the day of the killing.

Mr. Semaan: Roy, it's in evidence and it will speak for itself.

Mr. Barrera: All right.

Mr. Semaan: I want to make this clear, your Honor. There is writing on both sides of this. When introducing it I am introducing both sides of it.

The Court: It is understood.

Q. (Mr. Barrera continuing:) You didn't tell him in this statement here that you had intercourse with Herlinda Alcorta on the night of the killing, did you?

A. No, I didn't.

Q. But it appears in this statement here, Natividad, that you have said this: "I was asked in court during the trial whether or not I had had intercourse with Linda Alcorta and I said that I had not. I was asked this question by Alvaro Alcorta's lawyer and I knew I was not telling the truth when I said I had never had intercourse with Linda Alcorta."

A. I was never saked that question.

[fol. 67] Q. Did you make that statement appearing in this paragraph to Mr. Fred Semaan?

A. I couldn't say I said it because they never asked me that question.

Q. But it appears in the statement you purported to have given to Mr. Semaan and over your signature. Did you make that statement to Mr. Semaan?

A. I made it.

Q. Not the statement entirely, but did you tell him you were asked in court whether you had?

A. No, sir.

Q. But it does appear here?

A. Yes, sir.

Q. Natividad, Mr. Green and I went over to your house last night, is that correct?

A. Yes, sir.

Q. To talk to you about the truth or untruth of the statements that you have made to Mr. Semaan and any other statements that are purported to have been made by you, is that correct?

A. (Witness nodded in affirmation)

Q. Did we take the record of the trial with us?

A. That's right.

Q. That is, did we take this, which is a copy of the original?

A. That's right.

Q. Now, did we read to you from the record, and did we allow you to read the record of your testimony there last night?

A. That's right.

[fol. 68] Q. That is, the testimony that you gave in court?

A. That's right.

Q. Did you read that and did we read it to you?

A. Yes.

Q. All right. On page 118, where it says "Cross Examination" and "Questions by Mr. Lipscomb," did you read the questions asked of you by Mr. Lipscomb and the answers given by you to Mr. Lipscomb, in answer to his questions?

A. That's right.

Q. Natividad, were you ever asked by Mr. Lipscomb whether or not you had had intercourse with Herlinda Alcorta?

A. No, I was never asked that question.

Q. And did you ever answer, in a question to anybody about intercourse with Herlinda Alcorta, that you had not? In other words, did you tell in court that you had not had intercourse with Herlinda Alcorta?

A. No, I didn't.

Q. Well, it appears here in your statement you gave to Mr. Semaan.

A. I know that.

Q. And it appears over your signature, "Natividad Castilleja."

Q. And you did not tell him that?

A. I did not.

Q. Were you asked in court?

A. No.

[fol. 69] Q. Were you asked the question whether or not you had intercourse?

A. No.

Q. By anybody?

A. By anybody.

Q. Had you been asked the question by the prosecution or the defense, would you have told it?

A. I would have.

Q. Would you have told the truth as to whether you had or had not?

A. I would have.

Q. Going back to the proposition as to what conversations I had with you in the presence of Mr. Torres, at the time that you gave the statement to Mr. Torres, and that is this statement here, I believe. Now, this statement has been introduced by the defense as Defendant's Exhibit E. This statement was taken from you, Natividad, on the 20th day of July of 1955. Now, Natividad, was the statement complete; that is, was it already typed out and ready for signature at the time that I came in to read it and to talk to you about it, or do you remember?

A. I don't remember, but—I don't remember.

Mr. Semaan: A little louder, son.

A. I know I told you.

Q. Yes. Now, Natividad, isn't it a fact both Mr. Torres and myself, after you had made this statement, questioned you further and closer as to whether you did have inter-

[fol. 70] course with Herlinda or did not? We asked you about that, didn't we?

A. I don't remember, when you were typing or after.

Q. Yes. Well, without regard to that, did Mr. Torres, or myself, either one of us or both of us at that time; didn't we ask you, "Now, Natividad, tell us the truth, did you have intercourse or didn't you"?

A. Yes, I did.

Mr. Semaan: Your answer was?

A. Yes, I did.

The Court: The witness will have to speak loud enough for all counsel at the table to hear you as well as the court reporter and myself.

Mr. Semaan: May I get closer?

The Court: I'm instructing him to speak loûder.

Q. Now, Natividad, at the time that Mr. Torres talked to you by himself about the testimony you had to make in this statement here, did you tell Mr. Torres at that time that you had had intercourse with Herlinda Alcorta?

A. I don't remember.

Q. Isn't it a fact, Natividad, that it was only after I had come in there——

Mr. Semaan: Your Honor, the witness has said he doesn't remember, and now he's——

The Court: I'll overrule your objection, Mr. Semaan.

[fol. 71] Mr. Semaan: All right.

Q. (Mr. Barrera continuing:) Isn't it a fact it was after I came in there and both Mr. Torres and I in there together that we both questioned you about the intercourse and you finally told us yes, you did have intercourse with her about four or five times?

A. Yes.

Mr. Semaan: What is your answer?

A. I don't quite remember, but I told them everything I knew.

Q. Now, Natividad, at that time did you tell us you had had intercourse with Herlinda Alcorta on the night of the killing?

A. No, I didn't.

Q. Did you have intercourse with Herlinda Alcorta on the night of the killing?

A. No, I didn't.

Q. Well, again, Natividad, now in the first statement that you gave Mr. Semaan where he asked you to tell him all that you knew about the case, as in the statement we have there where we asked you to tell us all that you knew, in the first statement taken from you by Mr. Semaan on January 24th, where we find the statement here that you admit that you committed perjury on the stand and that you admit that you were asked certain questions about intercourse and you admit that you denied that; did you tell him at that time you had had intercourse with Herlinda Alcorta on that night?

A. No, I didn't.

[fol. 72] Mr. Semaan: Your Honor, to save a little time; we'll get out a subpoena for Susencio Castilleja, San Antonio Furniture Company. What's that address? 702 San Pedro.

Q. (Mr. Barrera continuing:) That was a full-page statement you gave him, is that right?

A. That's right.

Q. Legal-size-typewritten statement, is that right?

A. That's right.

Q. Did you type that statement, or someone else?

A. Fred Semaan typed it.

Q. Mr. Fred Semaan here. I see. Two days, Natividad, after you made that full-single-spaced-typewritten statement to Mr. Semaan, which he typed out; two days after that, according to the date appearing on the second statement, January 26th of 1956—but it should be '57, I'm sure.

Mr. Semaan: Yes.

Q. '57, it should be. You made another full typewritten statement to Mr. Semaan, single spaced again?

A. That's right.

Q. That's just two days after you made the first statement?

A. That's right.

Q. Did you type that out, or Mr. Semaan?

A. Mr. Semaan typed it out.

Q. Again, Natividad, as in the first statement here, where you admit that you had intercourse with Herlinda Alcorta and you admit you were asked about this intercourse in the trial of the case and you admit that you perjured your-

[fol. 73] self and did not tell the truth, as that statement appears in that, as that comment from you appears in that statement, we also have in this other statement here where you admit to Mr. Semaan that you had sexual intercours with Alcorta's wife the night she was killed. Did you tell him any such thing?

A. No, I didn't tell him. I told him they didn't ask me that I did, but they didn't ask me.

Q. Did you have intercourse with her that night?

A. Not that night. That was before.

Q. I see. Now, getting back to the third statement, Natividad, that Mr. Semaan took from you on February 19th, with respect to the first portion of it. "If Roy Barrera had not told me that I did not have to admit I had intercourse with Herlinda, I would have told the truth and told the jury how many times I had intercourse with Herlinda." Now, you say that if I had not told you that you did not have to admit, you would have told the truth; is that correct?

A. That's right.

Q. Now, actually, Natividad, did you tell the truth on the stand?

A. I did.

Mr. Semaan: Your Honor, wait a minute. That's a conclusion of the worst kind. I'm going to introduce the statement of facts. That will speak for itself.

The Court: You just asked——

Mr. Semaan: All right.

[fol. 74] Q. (Mr. Barrera continuing:) Did you tell the truth on the stand, Natividad?

A. I just said yes.

Q. Did you answer each and every question asked of you truthfully?

A. I was. I did, I mean.

Q. All right. Therefore, when you say here if I had not told you that you did not have to admit that, that you

would have told the truth, do you actually mean that, or mean if the question had been asked of you?

A. That's right.

Q. All right. In view of what I may have told you, and we'll get to that in a few minutes, if the question had been asked of you, Natividad, did you or did you not have intercourse with Herlinda Alcorta, what would have been your answer on the stand?

A. Yes.

Q. All right. In spite of what I may have told you, you would have answered the truth, is that correct?

A. That's right.

Q. Now, Natividad, at the time you made that statement to Mr. Torres and myself, there in the District Attorney's office on the 20th day of July of 1955, after you made the statement, after it was complete, didn't you ask this question of me: "Well, what should I say if someone goes out to my house to try to take a statement from me?"

A. That's right.

[fol. 75] Q. Didn't I tell you at that time, Natividad: "You can make a statement or you can tell them if you want to, Natividad; you do not have to tell them anything if you don't want."

A. That's right.

Q. "I would prefer that you did not."

A. That's right.

Q. And I told you the reason why?

A. That's right.

Q. Didn't I tell you at that time the time would come, if you did make a statement——

Mr. Semaan: Your Honor, that is the same objection I made awhile ago. The attorney is testifying and asking the witness to affirm. I don't care what he brings out; I want it in the form of a question.

The Court: I think you ought to rephrase your question.

Mr. Barrera: All right.

Q. (Mr. Barrera continuing:) Natividad, did I or did I not tell you, if you signed other statements that later on your name would appear at the bottom of some statement, with statements on top of it that you might or might not have made, but nevertheless your name would be signed at

the bottom and you would be held to them; didn't I tell you that?

A. Yes.

Q. And that's the reason I preferred you did not?

A. That's right.

[fol. 76] Q. With respect to your testimony in court, didn't you also ask me: "What should I say if they ask me about intercourse in the courtroom?"

Mr. Semaan: Just a minute, your Honor. I think that question is the same proposition. He's making a statement and asking him to affirm it. He could say: "What did I tell you?"

Mr. Barrera: Your Honor, in the interest of time and in view of the many statements, contradictory and otherwise, that have been made here, this witness can certainly know whether, or state whether I asked him such a question, or whether I did not, and what his answer was thereto, if any.

Mr. Semaan: I think the attorney himself can testify, when the time comes, what he told him and what answers he got, but I object now to his making a long statement about what he did or didn't do and then saying, "Now, isn't that right, Natividad?"

Mr. Barrera: If it please the Court, that is only in answer to the questions that have been predicated by Mr. Semaan to the same witness to the contrary, which we have not yet gotten clear answers. I would like to clear it up if the Court will permit me.

The Court: I think you ought to rephrase your question and ask if he remembers first.

Mr. Semaan: Did the Court instruct him to ask him if he remembers what he said?

The Court: Yes.

[fol. 77] (Mr. Barrera continuing:) Natividad, do you remember what it was that I told you about your testimony in court if you shou d be asked about intercourse in court?

A. Yes, I remember.

Q. What did I tell you?

A. Well, I had to tell the truth.

Q. I see. What else did I tell you about your testimony in court?

A. Not to volunteer anything that was not asked.

Q. Not to volunteer anything not asked of you?
A. That's right.
Q. But to answer each and every question on the stand truthfully?
A. That's right.
Q. Did you do that?
A. I did.

The Court: Mr. Semaan and Mr. Barrera.

(Conference between attorneys and the Court at the Court's bench.)

The Court: Mr. Bailiff, when the court recesses for noon I want you to clear the courtroom as well as the hall outside the courtroom. Mr. Howard, you may take the prisoner. Keep your seats.

(Alvaro Alcorta is escorted from the courtroom.)

The Court: The Court will stand in recess until 1:30 this afternoon. The courtroom will be cleared.

[fol. 78] (Thereupon, at 12:10 p.m., February 21, 1957, the Court recessed until 1:30 p.m. of the same date, at which time the following proceedings were had:)

Mr. Barrera: The State will recall Natividad Castilleja to the stand, please.

(Natividad Castilleja returns to the witness stand, whereupon, cross examination continued as follows:)

Q. (Mr. Barrera continuing:) Castilleja, you are the same Natividad Castilleja who testified here this morning, is that correct?
A. That's right.
Q. Now, Natividad, in answering these questions, again, I want you to speak out loud enough so the reporter here may hear you and so we may hear you and, of course, the Judge. Natividad, during the trial of the case of Alvaro Alcorta, you were asked certain questions with respect to where you saw Herlinda Alcorta for the first time the night of the killing; do you remember that?
A. Yes.
Q. All right. Now, where did you see her for the first time that night?

A. In Los Angeles Night Club.

Q. The Los Angeles Night Club. And at the time you arrived, if you recall, was she already there, or were you already there?

A. I was there first.

[fol. 79] Q. You were there. At the time she arrived at this place, did she arrive by herself or with someone?

A. By herself.

Q. Now, you stayed there for about how long during the time, from the time that she came up until the time you left, if you did?

A. Exactly, I don't remember, but it must have been about half an hour I would say.

Q. I see. Now, during the time you were there and that she was there, did you have occasion to dance with Herlinda?

A. I didn't have, but I danced with her.

Q. You danced with Herlinda there?

A. Yes, sir.

Q. About how many times did you dance with her?

A. About two times.

Q. About two times. During the time you were there and she was there, did you see her dance with anybody else?

A. Well, she danced with somebody else.

Q. She danced with other men or other boys, whatever they may have been, is that correct?

A. That's right.

Mr. Semaan: It occurs to me, I don't think this is a proper line of questioning for impeachment or any other purpose. It hasn't been gone into. There is no controversy on this part of it as to whether or not this part of his testimony in the trial was suppressed. I don't mind taking all the time necessary, but I don't see any reason [fol. 80] for rehashing his testimony in the trial court unless there is a question of suppression or perjury involved.

The Court: What is your purpose?

Mr. Barrera: My purpose is, your Honor, to show that the witness during the trial of the case did not deny he saw Herlinda Alcorta with other men. In fact he testified he saw her dancing with other men there, to offset the proposition Mr. Semaan has inferred that he denied that he saw

her with other men during the course of the trial, because he said that he doesn't know if it was a man or woman who came up in the automobile that night.

Mr. Semaan: Well, the simplest way to solve that is to introduce that part of the Statement of Facts. If Mr. Barrera doesn't, I intend to.

The Court: At this time, Mr. Semaan, I'll overrule your objection.

Mr. Semaan: All right.

Q. (Mr. Barrera continuing:) So you did see Herlinda dancing there that same night with other men?

A. That's right.

Q. Was there any effort on your part at that time or thereafter to hide that from anybody?

A. No.

Q. Were you asked that question in court?

A. Yes, sir.

[fol. 81] Q. Did you answer it truthfully?

A. I did.

Q. Now, at the time that you saw her at this dance, do you know who the people were that she was with, if she was with anybody? I believe you said she came in alone, is that correct?

A. That's right.

Q. After she was there, did she sit with anyone, if you know?

A. Well, yes, I saw her sit down with a woman; I don't know who she was.

Q. I see. Natividad, in summing up, did anybody at any time from any source, before you took the stand to testify in the case of the State of Texas against Alvaro Alcorta, did anyone tell you to deny anything on the stand?

A. No.

Q. Did anyone tell you not to tell the truth on the stand?

A. No.

Q. How many times have you talked to Mr. Semaan about this case, that is, from the time he came into this case?

Mr. Semaan: You better tell him when that was I came in.

Mr. Barrera: I don't know exactly when it was you came in, but maybe he can tell me.

Q. Well, let's see, now. Let's see if we can help you. You did talk to him on at least three occasions we know about.

A. That's right.

Q. That's the three dates you have made statements to him.

[fol. 82] A. That's right.

Q. You have talked to him at those times, is that right?

A. That's right.

Q. Now, in the statement here, I believe, in one of those statements, you told Mr. Torres—— In this statement that you gave to Mr. Semaan, you told Mr. Semaan that you had told Torres, when he went out there to talk to you, that Mr. Semaan had told you not to talk to the District's Attorney's office or anybody from that office or give them a statement; is that correct?

A. That's right.

Q. Didn't he also tell you that when anybody came out to see you, you should let him know?

A. That's right.

Q. Didn't Mr. Semaan also tell you that you had committed perjury, but not to worry, that he was going to defend you?

A. That's right.

Q. Now, didn't Mr. Semaan also tell you at the time that you were given him the statement, and at the time Father Duffy was present, didn't Mr. Semaan or Father Duffy, one or the two, tell you it was your fault that Herlinda Alcorta was dead?

A. That's what they said.

Q. And if Alvaro Alcorta went to the chair, it would be your fault and would be on your conscience the rest of your life?

A. That's what they told me.

[fol. 83] Q. I see. Natividad, how old are you now?

A. Twenty.

Q. And how old were you at the time that this thing happened?

A. Nineteen.

Q. And how much schooling did you have?

A. Went through the 7th grade.

Q. To the 7th grade?

A. (Witness nodded in affirmation).

Q. At the time that you gave these statements, Natiyidad, as best you remember, the times you gave the statements there to Mr. Semaan, did you read them yourself, or did someone else read them?

A. Well, the first one, Father Duffy read it.

Q. Father Duffy read it. Did Father Duffy read it to himself, or read it out loud?

A. He read it out loud.

Q. At the time he was reading out loud, Natividad, were you paying attention to what Father Duffy was reading?

A. Well, yes, but he was—— I didn't understand some words.

Q. You didn't understand some words. Now, the other statement that you gave there, did you read that, or did somebody read it for you?

A. Which one, the second one?

Q. Well, you have indicated the one that Father Duffy was present at, that you heard Father Duffy read it.

A. That's right.

[fol. 84] Q. And I believe that was this first one here on January 24, 1957. Now, this second statement that you made on the 26th day of January of 1956 to Mr. Semaan. Did you read that, or did someone read it for you?

A. I read it. I read it myself.

Q. I see. And did you read it carefully, Natividad, or did you just look over it?

A. I tried to read it the best I could.

Q. The best you could?

A. Yes, sir.

Q. Now, Natividad, when Pete Torres and I were talking to you in connection with the statement that you made to Mr. Torres and myself, this one here—that's the one you made to Mr. Torres and to me there in the District Attorney's office—at that time did we discuss the Lucas case with you?

A. No, you didn't.

Q. Did we dicuss——

Mr. Semaan: Wait a minute. That's the same objection I have made so many times this morning. Did we do this or that or the other. I think the proper question is: "What, if anything, did we do, or what, if anything, did we

discuss?" I think that's a little bit too suggestive, when he calls his attention to something and says did we do something.

The Court: On this question, Mr. Semaan, I'll overrule your objection.

Mr. Semaan: All right.

[fol. 85] Q. Did we discuss the Lucas case with you?

A. No, you didn't.

Q. Did you tell us at that time you were a witness or had been present at anything that might have taken place over at that Mission Park?

A. No.

Q. Did we talk to you about anything, or any other case outside of the Alvaro Alcorta case?

A. No.

Q. Now, who is Alex Coy, Natividad?

A. Well, he was employed where I was working at.

Q. Is he the brother of Rudy Coy?

A. Yes.

Q. Is Rudy Coy the defendant who was tried twice here for the offense of murder and sentenced to the penitentiary for ten years?

A. That's right.

Q. Is that the same Rudy Coy I tried and Mr. Semaan defended?

A. That's right.

Q. Who was it that first got you to go up to Mr. Semaan's office?

A. Rudy Coy.

Q. Rudy Coy or Alex Coy?

A. Alex Coy.

Mr. Semaan: Wait a minute, son. Think about that a little.

[fol. 86] The Court: Mr. Semaan, let Mr. Barrera finish. If you want to take him on voir dire, please request permission of the Court.

Mr. Semaan: All right.

Q. (Mr. Barrera continuing:) Now, did you have a conversation——

Mr. Semaan: May I at this point take him on voir dire to clear that up?

The Court: For what purpose, Mr. Semaan?

Mr. Semaan: In view of the statement he just made that Alex Coy was the first person who brought him to my office.

The Court: You'll have a chance to cross examine the witness.

Mr. Semaan: All right.

Q. (Mr. Barrera continuing:) Did you have a conversation with Alex Coy about your having had intercourse with Herlinda Alcorta?

A. Yes, I did.

Q. As a result of that conversation you had with Alex Coy, did anyone try to get you to go up to Mr. Semaan's office to make a statement?

A. Well, he did.

Q. Alex Coy?

A. Yes.

Q. And did he ever tell you to go up to Mr. Semaan's office, or that he wanted to take you?

A. Yes, he told me.

[fol. 87] Q. How many times did he tell you that?

A. About two times. Twice.

Q. About two times. As far as you know, was Alex Coy involved in this case at all?

A. No, he wasn't.

Q. And did he ever tell you why he wanted you to go to Mr. Semaan and not any other attorney or to the District Attorney's office or see the press or anything?

A. Yes, he was claiming that I was the one that caused the death; I was the one that took her home and that's why she was killed.

Q. Alex Coy told you that?

A. Yes.

Q. Natividad, did anybody ever come out to your house and try to talk to you about this case, this Alcorta case, before the trial?

A. Nobody.

Q. Did any attorney representing the defendant or any investigator or anyone come out and get in touch with you as to what your testimony was going to be, or what you knew about this case outside of the statement Pete Torres took from you?

A. No, nobody.

Q. From the time that the offense happened, Natividad, which was in June, or I should say after the case was over, after the trial was over on Alvaro Alcorta, did I ever have [fol. 88] occasion to talk to you or discuss this case with you again until last night?

A. That's right, until last night.

Q. Last night was the first time I have gotten in touch with you since this case was over?

A. That's right.

Q. That is with respect to this particular case here?

A. Witness nodded in affirmation.)

Q. Have I seen you in the course of that Lucas case; did I see you in the District Attorney's office there once or twice?

A. You mean after that trial?

Q. When the Lucas case was being tried, whenever that was, didn't I see you once or twice there in the District Attorney's office?

A. Yes.

Q. Did I discuss at that time the Alcorta case with you or anything?

A. No, you didn't.

Q. Last night when I came out to see you, Natividad, at your house, was your brother present?

A. Yes, he was.

Q. And was your mother present?

A. Yes, she was.

Q. And was there some other young man there present, whatever might have been his name?

A. Yes.

[fol. 89] Q. Did I ask you to give me a statement or put anything in writing?

A. No, you didn't.

Q. Did I ask you to read the record of the trial court?

A. Yes.

Mr. Semaan: Judge, I think he's leading and suggesting a little too much. I still say the proper question is: "What, if anything, did I do?" Not telling and suggesting the answer.

Mr. Barrera: Mr. Semaan apparently forgets he put this witness on the stand. I have a right to lead him, if I so see fit, under the rules of evidence. Even if they are

restricted, I still have a right to cross examine him. And according to the Court's information to us, is that he was relaxing the rules in this type of hea ing. So if the rules are relaxed, I would even have more latitude than I would normally under cross examination of this witness.

The Court: This witness, too, is not readily responsive to the questions either, Mr. Semaan.

Mr. Semaan: All right.

Q. Did I ask you to read the statements that you made in court, that is, the official record of the court?

A. Yes.

Q. With respect to what you had said and so forth and so on?

A. That's right.

[fol. 90] Q. Did you do that?

A. Yes, I did.

Q. Did I promise you that if you committed perjury that we weren't going to prosecute you?

A. No, you didn't.

Q. Did I ask you whether or not the statements in this record were true?

A. That's right.

Q. Did I ask you whether or not you had told the truth at the original trial?

A. Yes.

Q. In view of this statement here, again, appearing in Defendant's Exhibit C, the statement which you made to Mr. Semaan on the 24th day of January of 1957, wherein you are alleged to have said this: "I was asked in court during the trial whether or not I had had intercourse with Herlinda Alcorta and I said that I had not. I was asked this question by Alvaro Alcorta's lawyer and I knew I was not telling the truth when I said I had never had intercourse with Herlinda Alcorta." Now, you have told us and told the Court here you did not make that statement to Mr. Semaan, is that correct?

A. That's right.

Q. Because that did not happen?

A. That did not happen.

[fol. 91] Mr. Barrera: Your Honor, at this time the State will introduce into evidence the official transcript of the Statement of Facts taken in the Alvaro Alcorta case.

Mr. Semaan: We have no objection.

The Court: It will be admitted into evidence.

(Instrument referred to was marked by the reporter as State's Exhibit No. 1 for identification.)

The Court: I think that it should be pointed out for the purposes of the record that that is a duplicate copy; the original is in the Court of Criminal Appeals.

Mr. Barrera: Yes, sir. Let the record reflect that the State at this time introduces into evidence—And will you stipulate this is a true and correct copy of the original in Austin?

Mr. Semaan: I would be glad to stipulate, but I can't honestly say; I haven't read both completely through. I assume and have no reason to believe otherwise; I'll say that.

Mr. Barrera: We introduce into evidence the duplicate copy of the Statement of Facts in the case of the State of Texas vs. Alvaro Alcorta, which was in the Criminal District Court No. 2 of Bexar County, Texas, Number S-54370. We further introduce into evidence the original confession of the defendant, Alvaro Alcorta, which was introduced at that time as State's Exhibit No. 1, the statement of the defendant consisting of five pages and dated July 11, 1955, which introduction and admittance into evidence is reflected [fol. 92] in page 124 of this duplicate Statement of Facts which we are introducing. Let the record reflect there are some penciled notations appearing on the statement now and that we do not introduce any penciled notations other than the printed matter appearing thereon.

Mr. Semaan: The penciled notations were made by me, as I stated to the Court, and I will personally erase them. They were made for my benefit before it was turned over to the reporter.

The Court: It will be admitted into evidence.

(Thereupon, State's Exhibit No. 1 admitted in evidence and attached hereto.)

Mr. Barrera: That's all we have.

Redirect examination.

Questions by Mr. Semaan:

Q. Now, Natividad, you have just stated to Mr. Barrera that last night was the first time he tried to get in touch with you; is that right?

A. That's right.

Mr. Barrera: No, no.

Q. Huh?

A. That's right.

Mr. Barrera: Just a minute.

Mr. Semaan: Let the witness answer.

[fol. 93] Mr. Barrera: We are going to object to that as being a misleading statement: "Last night was the only time that you stated that Mr. Barrera tried to get in touch with you." I did get in touch with him.

The Court: I think you should rephrase your question, Mr. Semaan.

Mr. Semaan: Your Honor, my recollection was: "Did I get in touch with you or try to get in touch with you before last night?" That's why I phrased the question that way.

Mr. Barrera: The record will reflect it.

The Court: Mrs. Stevens, find that in the record.

Mr. Semaan: It's not that important.

The Court: All right. Then rephrase your question, Mr. Semaan.

Mr. Semaan: All right.

Q. (Mr. Semaan continuing:) The truth of the matter is, Natividad, Mr. Barrera, according to your story to me, sent Herlinda Alcorta's father to see you about two nights ago, didn't he?

A. That's right.

Q. And Herlinda's father told you Mr. Barrera would like you to come down and talk to him?

A. That's right.

Q. And you didn't want to go, did you?

A. Well, no.

Q. And you came and told me that, didn't you?

A. Yes, I did.

[fol. 94] Q. And last night Mr. Barrera and Mr. Green

went out to your house uninvited, didn't they; or did you ask them to come out?

A. No.

Q. Now, isn't it a fact that last night, Mr. Castilleja, Mr. Green and Mr. Barrera went to your house and showed you a copy like this?

Mr. Barrera: If it please the Court, now we do object to the counsel leading his witness, the objection he was making to our cross examination, as definitely leading.

The Court: In view of the circumstances and the position this witness is in, I'm going to to overrule your objection.

Mr. Barrera: All right.

Q. Isn't it a fact they took a copy of this Statement of Facts of the Alcorta trial with them?

A. That's right.

Q. And they showed you either all or certain parts of it?

A. That's right.

Q. And they showed you the statement that your made to me and Father Duffy?

A. That's right.

Q. And they showed you how much difference there was in the two?

A. That's right.

Q. And advised you or told you, or pointed out to you that it would be best if your testimony today didn't show that particular difference; isn't that right?

[fol. 95] A. No, sir.

Q. Your brother was there, wasn't he?

A. Yes, he was.

Q. Didn't they tell you that, in so many words: "Now, Natividad, you know Alvaro Alcorta's lawyer didn't ask you if you had intercourse." Mr. Green and Mr. Barrera, or either or both?

A. If they asked me that?

Q. Yes.

A. No, they didn't.

Q. Are you sure of that?

A. I'm sure.

Q. They didn't show you in the book here, the Statement of Facts, where I'm pointing to, State's Exhibit No. 1; they

didn't show you this and say, "Now, you see here, Alcorta's lawyer didn't ask you that question"? They didn't do that?

A. About what?

Q. About having intercourse with Herlinda.

A. He didn't ask me.

Q. They didn't tell you that last night; Green and Barrera?

A. Yes, they did.

Q. Did they or didn't they?

A. They did.

Q. They did what?

A. Told me that they didn't ask me that.

Q. That who didn't ask you that?

A. Alvaro Alcorta's lawyer.

[fol. 96] Q. All right. And didn't they then say: "So you can now say safely, Natividad, that the reason you didn't tell about the intercourse was because Alvaro Alcorta's lawyer didn't ask you that." Didn't they put it to you that way?

A. Not exactly, no.

Q. Just what did they say after they showed you that Alcorta's lawyer didn't ask you about having intercourse with Herlinda?

A. Well, that they didn't ask me, so——

Q. So you have told the truth; isn't that what they told you?

A. I told them I told the truth.

Q. Yes. But you didn't want to talk to them and you told me so.

A. Yes. I didn't want to talk to nobody because I had made so many statements I didn't know what I was——

Q. Yes, and you came to my office and asked me to help you and protect you so you wouldn't have to talk to them, didn't you, Natividad?

A. No.

Q. Then what in the name of heaven did you come to my office for the last time?

A. That guy went to my house and asked me if I had intercourse. I said of course I did.

Q. No, I'm talking about Herlinda's father coming to your house and saying Barrera wanted to talk to you. Why did you come to me then?

A. I just wanted to get advice, that's all.

[fol. 97] Q. Look, Natividad, I asked you three times this morning whether or not you had talked to any member of the District Attorney's office since I saw you the last time. Didn't I ask you that?

A. Yes, you did.

Q. And what did you tell me?

A. I told you that I didn't.

Q. That you what?

A. That I didn't.

Q. That you did not?

A. Yes.

Q. Three times you told me that, didn't you?

A. Yes, I did.

Q. Then you get on the stand and finally admit now that Mr. Green and Mr. Barrera were out at your house and talked to you.

A. Yes.

Q. Why did you lie to me?

A. Because I told you right now there were too many statements. I just kept my mouth shut, that's all.

Q. But this morning when you walked in the court with Mr. Green and I walked over to you and said, "Natividad, have you talked to any member of the District Attorney's office since I saw you last, since you came to my office and told me about Herlinda's father coming to your house wanting you to talk to Barrera?" I said, "Have you?" You said, "No."

[fol. 98] A I didn't want to talk to nobody, because—

Q. I asked you three times.

A. That's right.

Mr. Barrera: We are going to ask that the witness be given an opportunity to answer. He said, "I didn't tell you because," and was cut off with another question. Because what?

The Court: The objection is well taken. Give him time to answer the question.

Mr. Barrera: Because of what?

A. Well, I just told, because I done so many statements that I just thought I'd keep my mouth shut, that's all.

Q. (Mr. Semaan continuing:) Why did you lie to me three times this morning?

A. Just because of that.

Q. Because you made so many statements?

A. Yes, I didn't want to make no more. That's what I told the day they went to my house.

Q. All right. Isn't it a fact, Natividad, that the fact that you didn't tell the truth in Alvaro Alcorta's trial was bothering you and was on your conscience?

A. Would you repeat that question again?

Q. The fact that you did not tell the truth in Alvaro Alcorta's trial, wasn't that bothering you and was it not on your conscience?

[fol. 99] The Court: Don't answer the question.

Mr. Barrera: We object to it. He's assuming the fact this witness testified he did not tell the truth in Alvaro Alcorta's trial, and this witness stated he did tell the truth. And then asking the question if that wasn't bothering him.

The Court: I'll sustain the objection.

(Conference between attorneys and the Court at the Court's bench.)

Mr. Semaan: Let me put it another way then.

Q. (Mr. Semaan continuing:) Isn't it a fact that you didn't admit having intercourse with Herlinda Alcorta, and Alvaro Alcorta's trial was bothering you and was on your conscience?

A. It wasn't on my conscience because I told the truth.

Q. Why, then, did you tell Alex Coy that you had lied and it was worrying you?

A. I didn't told him I had lied. I told him I had told the truth and I could say it because I didn't have nothing to hide.

Q. Didn't you also tell your brother about that?

A. That I had, yes.

Q. That you had denied it in court?

A. No, I didn't.

Q. Or refrained in court from admitting intercourse with Alcorta's wife?

A. No.

Q. But you did tell Alex Coy about that, didn't you?
[fol. 100] A. I told my brother, too, but not that night.
Q. And you told them the truth of the matter was that you had had intercourse with her, didn't you?
A. Yes, I told them.
Q. Now, son, who did you say took you to my office the first time you ever saw me, when you made that statement?
A. Alex Coy and Father Duffy.
Q. Alex Coy and Father Duffy?
A. That's right.
Q. When you said Alex Coy alone awhile ago, that wasn't correct, was it?
A. The one that went first to my house, twice.

Mr. Barrera: Mr. Semaan is assuming facts the witness has not testified to and predicating that to other unfair questions. We object to it. He never said Alex Coy alone.
The Court: The record speaks for itself. The Court is familiar with the testimony that has been given.

Q. So when you said awhile ago that Alex Coy brought you to my office, what you meant to say was Alex Coy and Father Duffy.
A. Well, yes.
Q. The first time Alex Coy asked you to come to my office, you wouldn't come?
A. That's right.
[fol. 101] Q. The second time he asked you, you wouldn't come?
A. No.
Q. You did come when Father Duffy went to see you?
A. Yes.
Q. You admitted all this to Father Duffy when he talked to you at your house?
A. That I had intercourse, yes.
Q. And then Father Duffy asked you if you would put it in writing and swear to it and you said yes.
A. Yes.
Q. Then he brought you to my office?
A. That's right.
Q. All right. Now, son, you say that in this second statement where you admit having had intercourse with Herlinda Alcorta, the second statement I took from you: "The

truth is just like I told Father Duffy. I did have intercourse with her that night and on other nights." You say that's in there, but you really didn't read it?

A. That's right.

Q. And didn't know it was in there?

A. I didn't even know what intercourse meant.

Q. Son, now you stop and think before you answer this. You remember you first came to see me with Father Duffy?

A. That's right.

Q. And you made the first statement?

A. That's right.

[fol. 102] Q. The next day Mr. Garza and Mr. Torres from the District Attorney's office went out to where you work and talked to you.

A. That's right.

Q. You had your brother phone me at my house that night.

A. My brother?

Q. Yes, your brother, Susencio, to tell me that the District Attorney wanted you to come to their office and to make a statement and asked my advice on what to do; is that right or not?

A. I guess so, I don't remember.

Q. And I told your brother to bring you back to my office the next day; is that right or not?

A. I guess it's right.

Q. And you came back to my office the next day?

A. Yes, I did.

Q. Now, I talked to you and then I took this second statement from you, didn't I?

A. That's right.

Q. Isn't it a fact, Natividad, and you think and think a long time, because I want you to remember you are under oath now; you are swearing to your God to tell the truth.

A. (Witness nodded in affirmation.)

Q. Didn't I tell you while taking this statement: "Look, Natividad, the truth of the matter is you did have intercourse with Herlinda the night she was killed." And you hung your head a little bit and then you looked up to me, [fol. 103] in the presence of your brother, and said, "Yes, that's right."

A. I said days before, nights before.

Q. I'm talking about the night she was killed. Didn't I say to you: "The truth of the matter is you did have intercourse with her that night."

A. No, I didn't.

Q. And you said, after you hung your head a little, you said, "Yes, that's right."

A. No, I don't remember saying that.

Q. You don't remember saying that?

A. No, I don't.

Q. You don't remember my telling you that, but it's in this statement and your story now is that you read it all except that part; you don't remember that part being in there?

A. I read it, but I didn't understand what that word meant.

Q. You understood what that word meant the day before; two days before, rather.

A. No, I didn't.

Q. Do you deny now you ever had intercourse with her?

A. No, I don't deny it. I say that night I didn't.

Q. When you made this first statement I used the same word "intercourse", didn't I?

A. Yes.

Q. You knew what it meant then, didn't you?

[fol. 104] No, I didn't. I didn't read it; Father Duffy read it.

Q. When did you first find out what intercourse meant?

A. After that.

Q. After what?

A. After I came down here.

Q. When was that?

A. I don't remember exactly when that was.

Q. When did you come down here after this; after you made these statements?

A. Well, when they went up to talk to me, that's when.

Q. Who, Green and Barrera?

A. That's right.

Q. That's when you decided you didn't know what intercourse meant?

A. That's right.

Q. When they went out to see you, you then found out what the word meant?

A. That's right.

Q. Up until then you had no idea what intercourse meant?

A. That's right.

Mr. Semaan: That's what I thought.

The Court: Order in court.

Mr. Semaan: I want to apologize to the Court and everybody. I shouldn't have made that statement. I'm sorry I did. That last part, please strike that from the record.

[fol. 105] Q. Now, you say that no one in the District Attorney's office, Mr. Barrera or anybody else, told you to withhold any evidence about having intercourse with this girl, or to deny it, or not to admit, or anything like that; you say no one told you that?

A. Nobody.

Q. Do you read the papers, son?

A. Well, once in a while, yes.

Q. Did you read in the paper where Mr. Barrera, before the Board of Pardons and Paroles, admitted he did tell you that?

Mr. Barrera: Just a minute, we object to that; certainly not having been shown it was in the paper. If Mr. Semaan takes what is in the paper as being facts in this case, certainly we object to it and hope the Court will take judicial notice of what's in the paper.

Mr. Semaan: I'll have the newsmen as witnesses.

The Court: Until you put them on, I'll sustain the objection.

Mr. Semaan: All right. May I put them on now, your Honor?

The Court: If you are through with this witness.

Mr. Semaan: Just to prove up this portion and ask him that question.

The Court: This witness will be available any time you want to call him back, Mr. Semaan.

Mr. Semaan: All right.

[fol. 106] Q. (Mr. Semaan continuing:) How long did Mr. Barrera and Mr. Green talk to you last night, son?

A. Oh, about an hour and half, I guess.

Q. They were out at your house an hour and a half.

A. About.

Q. Did you invite them out there?

A. Well, like I told you, her father——

Q. No, son, like I tell you, did you invite them out there, yes or not?

A. Well, in a way, yes.

Q. Well, in a way?

A. Well, like Herlinda's father went up there and told me they wanted to talk to me. I said, "Well, if they want to talk to me, have them come to my house."

Q. Didn't you tell me Herlinda's father came and you said, "I don't want to talk to them"?

A. Yes.

Q. Did Herlinda's father come back after that?

A. Yes.

Q. He came the second time?

A. Yes.

Q. Did Herlinda's father tell you who sent him out the second time?

A. Yes, just told me that Barrera——

Q. That Barrera sent him out the second time and told him to give you that message?

A. Well, yes.

[fol. 107] Mr. Semaan: Your witness.

Recross examination

Questions by Mr. Barrera:

Q. Natividad, Pete Torres and Ismael Garza talked to you on one occasion at the place where you work, is that correct?

A. That's right.

Q. They asked you to give them a written statement, is that correct?

A. That's right.

Q. And you refused to give them a written statement, is that correct?

A. That's correct.

Q. Now, Mr. Semaan, you have given him three or four—three that are in evidence—written statements?

A. That's right.

Q. In his office: You haven't refused him, is that right?

A. No.

Q. And on the occasions that we have tried to talk to you, either Mr. Torres, Mr. Garza, or myself, you have gone to Mr. Semaan to seek his advice with respect to what you should do and if you should talk to them; isn't that right?

A. That's right.

Q. Isn't that the result of the fact that Mr. Semaan told you that you had committed perjury and he was going to protect you?

A. That's right.

Q. And he was going to defend you free?

[fol. 108] A. That's right.

Q. But that you had committed perjury?

A. That's right.

Q. And he was going to be your lawyer?

A. That's right.

Q. When anybody wanted to talk to you about this case, to come out and see him and he would give you advice?

A. That's right.

Q. In keeping with the protection Mr. Semaan was going to give you, you went up to see him; is that right?

A. That's right.

Mr. Semaan: That's a statement on the part of the District Attorney, in keeping with so and so. He can testify to that himself. I don't want him to use this witness as a Charlie McCarthy, your Honor.

The Court: I'll sustain the objection.

Mr. Barrera: All right.

Q. Herlinda Alcorta's father went out to see you and he told you I would like to talk to you; is that right?

A. That's right.

Q. That was day before yesterday, for the first time?

A. That's right.

Q. Then he went back and told you I wanted to talk to you?

A. That's right.

Q. That's when you told him if I wanted to talk to you, to come out to your house.

[fol. 109] A. That's right.

Q. So I did go out to your house.

A. That's right.

Q. We went out to your house. We didn't ask you to give us a written statement?

A. No, you didn't.

Q. You never have given us a written statement?

A. No, I haven't.

Mr. Semaan: Your Honor, I don't want to keep harping on this. We didn't tell you to do this, do that. I don't think that's proper. This is on cross examination, I know, but we would rather the witness be asked to relate what was said, rather than the attorney say it and then ask for either an affirmance or denial over and over and over.

The Court: I'll overrule your objection, Mr. Semaan.

Mr. Semaan: All right.

Mr. Barrera: We have no further questions, your Honor.

Redirect examination.

Questions by Mr. Semaan:

Q. Now, about me promising to defend you, that's true——

Mr. Barrera: Again, for the record, we object to that, the same as he was objecting to ours when we have a right to on cross examination. He comes right back with the same proposition. He's on direct and it is his witness. We object to it on the same token.

[fol. 110] The Court: Overrule your objection.

Q. (Mr. Semaan continuing:) This business about me defending you free of charge, I did make you that promise; didn't I?

A. Yes, sir.

Q. At whose request, Natividad? Who asked me if I would do that?

A. Did I?

Q. Who asked me if I would do that?

A. I did.

Q. Father Duffy did, didn't he?

A. Yes.

Q. And I promised you I would defend you on anything growing out of this, didn't I?

A. Yes.

Q. Now, was it volunteered on my part, or did I agree to that after Father Duffy asked me in your behalf if I would defend you; which way was it, son?

A. Which way? Would you explain it again; the question again?

Q. The fact of the matter is, Father Duffy first mentioned my defending you if any charges grew out of your statement. Father Duffy asked me if I would and I said yes, I would. That wasn't my idea. It was Father Duffy's, wasn't it?

A. (No response.)

Q. Right or not, son?

A. Right.

[fols. 111-124] Mr. Semaan: All right. No further questions.

Mr. Barrera: That's all.

Mr. Semaan: Step down, son, but don't leave; I want you a little later.

(Witness excused.)

[fol. 125] Roy Barrera, called as a witness in behalf of the Petitioners, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Semaan:

Q. Your name is Roy Barrera?

A. That's right.

Q. You are an Assistant District Attorney of Bexar County, Texas?

A. That is correct.

[fol. 126] Q. And you were so employed at the time that Alvaro Alcorta was tried for the murder of his wife?

A. That's correct.

Q. In Cause No. S-54370?

A. That's correct.

Q. Mr. Barrera, did you have occasion, on February 8th, to appear in Austin, Texas, as a witness before the Board of Pardons and Paroles?

A. Yes, I did.

Q. State, Mr. Barrera, whether or not you testified before that Board, speaking of Castilleja and his acts of intercourse with the deceased, Herlinda Alcorta, whether

or not you made the following statement: "Yes, I told him"— That's referring to Castilleja. Strike that. State whether or not you were asked by Gus Garcia, an attorney appearing before the Board in behalf of Alvaro Alcorta, seeking commutation from the death penalty to life sentence, whether or not you were asked by Gus Garcia if you had told Castilleja that he did not have to testify about his relations with Herlinda Alcorta, and I have reference to his sexual intercourse with her.

A. State the question again, the statement I am supposed to have made.

Q. I'm asking——

A. Again, ask me the question he is supposed to have asked.

Q. Did Gus Garcia ask you this question: If you did not in fact tell Castilleja that he did not have to testify about [fol. 127] his relations with Herlinda Alcorta?

A. Whether he asked the question?

Q. Yes.

A. Yes.

Q. And did you not give this answer: "Yes, I told him it was not admissible unless it was brought up by the defense." Did you give that answer?

A. That is not the full answer I gave.

Q. Did you give that much of it?

A. Yes, I did, that much of it.

Q. All right, now, did you go on further then and say that the defense had never introduced the question of Mrs. Alcorta's infidelity, and if they had, you would have objected to it anyway?

A. Yes, sir.

Q. You said that?

A. That's correct.

Q. But you did tell Mr. Garcia that you had advised Castilleja, the witness, that he did not have to testify about his relations with Mrs. Alcorta, Herlinda Alcorta, because in your opinion it was not admissible?

A. I told him that in addition to the proposition, which is not in there, that he should not and must not volunteer any information unless a question was asked of him; in which event, certainly, he had to tell the truth.

[fol. 128] Q. All right. You told him not to volunteer that?

A. That's correct.

Q. Unless it was asked of him?

A. That's correct.

Q. Now, didn't you, in the trial of the Alvaro Alcorta case, after you advised Castilleja that he didn't have to testify about that because it was not admissible, and further advised him not to volunteer it, didn't you, yourself, on direct examination, before the State had rested and the defendant began putting on his case, didn't you ask the following questions and get the following answers: "Question: Natividad, were you in love with Herlinda?"

A. That's correct.

Q. Did he or not answer: "No"?

A. That's correct.

Q. Did you or not, Mr. Barrera, under the same circumstances before the State had rested, and while the State was putting on testimony, when you had Natividad Castilleja on direct examination, your own witness, the witness you had warned not to volunteer that and advised that he didn't have to testify about his relations with the dead woman, didn't you ask the further question: "Was she in love with you?"

A. That's right.

Q. And didn't you get the following answer: "No"?

A. That's right.

Q. Didn't you then, under the same circumstances that I have outlined in the previous question, ask this question [fol. 129] to the same witness, Castilleja: "Had you ever talked about love?"

A. That's correct.

Q. And didn't you get this answer: "No"?

A. That's correct.

Q. Didn't you ask of the same witness, under the same circumstances, this question: "Had you ever had any dates with her other than to take her home?"

A. That's correct.

Q. And didn't you get this answer: "No. Well, just when I brought her from there."

A. That's correct.

Q. And your next question was: "Just when you brought her from work?"

A. That's correct.

Q. And the next answer was: "Yes."

A. That's correct.

Q. Mr. Barrera, you knew at the time that you asked these questions on direct examination, before the State had rested, you had knowledge of the fact and so did your boss, Mr. Green, that Natividad Castilleja had on several occasions had intercourse with Herlinda Alcorta.

A. I'll speak of what I had knowledge of and Mr. Green will speak for himself. I had knowledge that Castilleja had had intercourse with his wife on several occasions.

Q. And you sat there and asked those questions and heard those answers and did nothing about it.

[fol. 130] A. Yes, sir. There's nothing to do about it.

Q. That's for the Court to decide.

A. That's for me to decide at the time I asked the questions.

Q. Let me ask you this about things for you to decide: When did you come to the conclusion that it was your province or your duty to pass on the admissibility of evidence that a jury shall or shall not hear?

A. It is within my province at the time I am preparing a case as to what testimony I think is admissible and what testimony I think is not admissible, and frame my questions and answers, the trial tactics of the case, within keeping of what I think the law is, Mr. Semaan.

Q. Do you, as District Attorney, or does the Judge pass on the admissibility of evidence, Mr. Barrera?

Mr. Green: I think that's argumentive, your Honor.

The Court: I think the question is argumentive, Mr. Semaan.

Mr. Semaan: All right. I'll withdraw that.

Q. Would it not have been the more honorable and honest thing to do, Mr. Barrera, if you wanted to see that this man had a fair and impartial trial, when you heard those answers, knowing that the man had had intercourse with her, to notify the Judge as to the true answers or the true facts?

A. Mr. Semaan, the honorable thing is never to approach

he bench with the facts of a case, as I have often seen it lone, and try to influence a judge one way or the other.

[fol. 131] Q. Did you ever tell the trial judge in the Alcorta case—That was Judge Brown, I believe, wasn't it?

A. That's correct.

Q. —that Natividad Castilleja—you had knowledge of he fact that he had had intercourse with this girl on several occasions?

A. Did I ever tell him?

Q. Yes.

A. The occasion never arose and I know of no reason why it should be told.

Q. You never took it upon yourself; in spite of the fact the occasion never arose, you never felt it was your duty or took it upon yourself to tell the judges about that, either before the trial or after the trial; either before this testimony was elicited or after it was elicited, did you, Mr. Barrera?

A. Not any more so than I felt it was my duty to tell him about the character of the defendant, Alvaro Alcorta, or not more than the misconduct of Alvaro Alcorta, knowing myself it was inadmissible to begin with. It is not out of the ordinary to instruct any witness not to volunteer any information and to answer only the questions asked of him truthfully.

Mr. Semaan: Your Honor, I move everything but a yes or no part of his answer be stricken.

The Court: Overrule your objection.

Mr. Semaan: All right.

[fol. 132] Q. Did you ever take it upon yourself, Mr. Barrera, either before or after the trial, or before this testimony was elicited, this testimony I have just read to you and you have acknowledged, either before it was elicited or after it was elicited, did you ever take it upon yourself to, or feel a duty to inform the attorney for the defendant, Alcorta, of the true facts regarding the relationship between Herlinda Alcorta and Natividad Castilleja?

A. Not any more than I would feel there was a duty upon him to tell me what the defendant may have told him, or the true facts of the killing as it might have occurred as he knows it, no, sir.

Q. But you didn't tell the defendant's attorney that that

testimony you heard was not true: "The fact is I know and I have been told by Natividad Castilleja that he had intercourse with Herlinda Alcorta many times." You never did do that?

A. The testimony I heard from the witness stand, in so far as I heard and in so far as that record reflects, was true.

Q. As far as you are concerned.

A. That's true, and in so far as the record is concerned.

Mr. Semaan: Just a minute.

Q. Did you ever notify the defendant——

A. Notify who?

Q. The defendant, Alcorta, either before or after the trial, or before or after this testimony was adduced——

[fol. 133] A. The only time that I talked to the defendant——

Q. Let me finish the question.

A. All right.

Q. ——of the fact that Natividad Castilleja had had intercourse with Herlinda Alcorta on several occasions?

A. The only time——

Q. And, please, Mr. Barrera, if you can answer yes or no, without a speech, I would like that better.

A. I'm going to answer the way I think I ought to answer your question.

Q. And I'm going to get a speech, so go ahead.

The Court: Just a minute. If you have a request to make of the witness, address it to the Court.

Mr. Semaan: Yes, sir, your Honor. We would like for you to request the witness answer yes or no, because I think it can be answered yes or no.

The Court: If it is a question that can be answered yes or no, the Court will instruct the witness to answer yes or no.

Q. (Mr. Semaan continuing:) All right. The question is simply this: Did you notify the defendant, Alvaro Alcorta, or his attorney, either one or both, of the fact that Herlinda Alcorta and Natividad Castilleja had had intercourse on several occasions?

A. No, sir, I did not.

[fol. 134] Q. Either before the trial or after the trial?

A. No, sir, I did not.

Q. Either before these questions on pages 117 and 118 of the Statement of Facts were elicited, or after they were elicited?

A. No, sir, I did not.

Mr. Semaan: That's all. Thank you, Mr. Barrera.

Mr. Barrera: I would like the Court's permission to answer further and elucidate on the reasons why.

The Court: That is not necessary.

Cross-examination.

Questions by Mr. Woods:

Q. Mr. Barrera, going back to the taking of the statement on July 20th, I believe, of 1955——

A. Yes, sir.

Q. —you were present and Mr. Torres was present and Natividad Castilleja was present,

A. That's correct.

Q. Just what did you tell Natividad Castilleja at that time and place?

A. The situation, as I recall was this: Mr. Torres had been talking to Mr. Castilleja. He had the statement in writing already and asked me to go in there and look at it before the witness signed it. At that time I went in. I read the statement. I asked Castilleja if the statements contained therein were true. He said yes. I had a conversation with Mr. Torres in private. I asked him whether or [fol. 135] not he was asked if there was or was not any intercourse between Natividad and the deceased in this case. He said he wasn't too satisfied about that. We both then went back in and continued to ask him questions about prior acts of intercourse. He finally admitted he had had intercourse with Herlinda Alcorta on several occasions. I asked him whether or not he had had intercourse with Herlinda Alcorta on the night in question, that is, the night of the killing. He emphatically denied that. He, as I recall, was reluctant to sign a statement with any statements contained therein about the intercourse. I felt at that time that the fact that Alvaro Alcorta, whose confession I had taken approximately—or had been present at the time it was taken—approximately a week or possibly two weeks

before, that at the time of the taking of that confession from Alvaro Alcorta, he gave me no indication he knew of any misconduct on the part of his wife. That being the situation, not being apprised of it, then such a situation could not have entered into his mind at the time he committed the killing in this case, could not have contributed to it. Keeping further in mind the obvious education, or possibly lack of education, on the part of Natividad Castilleja and the possibility that is always present in any case that a witness may later on decide he will not get on the stand and tell you what he knows, or the possibility of having to refresh his memory from the very statement you have taken from him, or the possibility arising of having to impeach him with [fol. 136] the statement you have taken from him, that those things certainly would be immaterial to the over-all situation in this case, especially at that time, there being no sure answer to them.

Mr. Semaan: I object to any conclusion or opinion on his part.

The Court: It's before the Court, Mr. Semaan.

Q. Continue.

A. I told Mr. Torres to go ahead and wind up the statement and leave those things out. I told him, however, to put that information into the over-all jacket, which is a matter of public record and contained therein at this time. I told Castilleja at that time, in answer to his question: "What shall I do or say if someone comes out to see me?" Because I asked him: "Has anyone been out to see you?" He said: "No, nobody has been out to contact me." He says: "What shall I do if someone comes out to see me?" I said: "If someone comes out to see you and wants a statement from you, then you may give them a statement if you want; you don't have to give a statement if you don't want to. I would prefer you do not." I explained to him the reasons therefor: The fact someone might come out and take a statement from him, that he might or might not say the things that inevitably appear in the second statement with his signature at the bottom and saying that he had read it, and thereafter emphatically deny on the stand that he had made the statements contained in the second state-[fol. 137] ment. Nevertheless, it would be there with his signature thereunder and he would be impeached by it.

With that in mind, I told Castilleja that and the reasons I have stated. He then asked me: "Then what shall I say if they ask me that in court?" I said: "Under any and all circumstances, you answer each and every question that is asked of you on the stand truthfully; however, don't volunteer any information. You just answer the questions that are asked of you and that's all."

Q. Now, at the time we are talking of, you were taking a statement or confession from Natividad?

A. I was taking a statement from Natividad, or I should say I was in the process of helping Mr. Torres complete the statement he had taken.

Q. And for what purpose was that statement being taken?

A. To inform us of the facts surrounding his participation in the case.

Q. What do you mean by "us"?

A. Mr. Torres, or the District Attorney's office and myself, to let us know just what the extent of his participation in that case was, and so we could later, without having to go to Natividad Castilleja, just refer to the statement he gave us to refresh our memory as to what he said.

Q. For the use of the representatives of the State of Texas?

A. Yes, sir, use of the representatives of the State of Texas.

Mr. Woods: Pass the witness.

[fol. 138] Redirect examination.

Questions by Mr. Semaan:

Q. Roy, you say you told this man not to volunteer anything about the intercourse?

A. I told him not to volunteer any information.

Q. About the intercourse?

A. Intercourse or otherwise.

Q. But you put him on the stand and asked the question yourself of him, didn't you?

A. Asked what question of him?

Q. "Did you love her? Did she love you?" All that on pages 117 and 118.

A. Are you presupposing that with every act of intercourse there is love?

Q. Mr. Barrera, I don't want to discuss love with you.

The Court: Order in court.

Q. Regardless of your interpretation of it, or how you feel or don't feel when you indulge in an act of intercourse, I'm simply asking you a question. You told him not to volunteer and then you asked the question yourself and put your own witness in a position where he had to volunteer perjury, didn't you?

A. Volunteer perjury?

Q. Perjury, where you lie in court under oath.

A. Where has he volunteered perjury, Mr. Semaan?

[fol. 139] Q. Well, apparently—Well, I made a promise to the Court; I'll try to live by that. Now, you sat here today, Mr. Barrera, and got into the record, trying to leave the impression I'm sure when we go up to the Court of Criminal Appeals and to the Supreme Court, where we are going, that the jacket in this case in your office is public record and that that jacket contained information that Natividad did have intercourse with Herlinda Alcorta.

A. Yes, sir.

Q. Are you trying to say that all any attorney has to do today or even on that date and before is go and say, "Let me see your jacket on such and such case," and you'll show it to him?

A. After the trial is over and completed they can see it.

Q. After the trial is over and the appeal is up and gone and out of the way, then you'll show it.

A. It's a matter of public record.

Q. Then it's public record.

A. The reporters can tell you otherwise.

Q. Are you trying to tell me you would give it——

A. They do it every day.

Q. Do you do it?

A. That all depends on the case and the circumstances.

Q. Did you do it in this case, to Mr. Lipscomb; did you go to him and say, "Look, Mr. Lipscomb, the truth of the matter is Herlinda Alcorta and Natividad Castilleja had [fol. 140] intercourse many times; I want to tell you about that because I want to be fair and honest," that you raised that on newly discovered evidence. Did you do that?

A. Are you asking a question, or making a speech?

Q. I asked a question and I think you understand it.

A. What question are you asking?

Q. I'm asking if you apprised E. P. Lipscomb, the attorney for Alvaro Alcorta, in due time, so that he could raise the matter on appeal under newly discovered evidence. Did you apprise him of the facts that Herlinda Alcorta and Natividad Castilleja had had intercourse many times?

Mr. Green: That's repetitious. He has already asked the question and received his answer that he hadn't talked to Alcorta or his attorney.

Mr. Semaan: But he made the statement it was in the jacket and a matter of public record, trying to leave the impression all he had to do was go there and find it. I want to show that is not the true situation, that Mr. Lipscomb couldn't, under any circumstances, have gotten any information out of that file, and you know it, Roy.

A. Not before the trial, absolutely not.

The Court: Mr. Semaan, he has already answered the questions. I'm going to sustain the objection.

Mr. Semaan: I don't know what his answer is, after the trial before time of appeal is gone.

[fols. 141-144] The Court: He's answered the question, he did not tell him before he asked those questions related on page 117 and 118, nor after.

Mr. Semaan: And certainly not in time for appeal.

The Court: Well, if you want to, ask him that.

Q. (Mr. Semaan continuing:) Now, did you give him that information, or would you have allowed him to have it?

A. No, sir, I would not have allowed him to have it.

Mr. Semaan: That's all. Thank you, Mr. Barrera.

Recross examination.

Questions by Mr. Woods:

Q. Was any request made of you for that information?

A: No, sir.

Q. Up until this time?

A. Up until this time.

Mr. Semaan: It wouldn't have done any good. You've already said you wouldn't have given it to him. That is the question.

Mr. Woods: That's all.

(Witness excused)

[fol. 145] STEWART LONG, recalled as a witness in behalf of the Petitioners, having been duly sworn, testified as follows:

Direct examination (Cont'd.)

Questions by Mr. Semaan:

Q. Now, Mr. Long, you are the same Stewart Long who was on the witness stand just a few minutes ago?

A. I am.

[fol. 146] Q. You are the witness who testified, regarding this hearing at the Board of Pardons and Paroles on February 8th, that it was you who transmitted that story to the San Antonio Light?

A. Yes.

Q. And that you were present when Roy Barrera made the statement before the Board?

A. Yes.

Q. What did you hear Mr. Barrera say?

A. Just what he said, or do you want the question that was asked?

Q. Give us any background you want, but bear in mind I'm speaking of the point where he stood up and said, "I'll take the blame for that," or words to that effect.

A. Mr. Green was being questioned about his policies with regard to his investigator's interview with witnesses, and Mr. Barrera stood up and said, "I was at those interviews between the investigator and Natividad."——

Q. Castilleja?

A. —"Castillega, and I'm responsible for the alleged subornation of perjury." Whereupon, Attorney Garcia put Mr. Barrera on the stand and asked him the question as to whether he told the witness, Castilleja, that he did not have to testify concerning sexual relations with Mrs. Alcorta, and he said, "Yes."

Q. Who said yes?

A. Mr. Barrera said yes, that it was not admissible unless it was raised as a defense, and that had it been raised, he would have objected in the court.

[fol. 147] Mr. Semaan: Your witness.

Cross-examination.

Questions by Mr. Barrera:

Q. Were you always present and did you remain long enough, Mr. Long, to hear the full statement made, and that was that I further instructed him he was not to volunteer any information?

A. Yes.

Q. But to answer each and every question asked of him truthfully on the stand?

A. Yes.

Q. With respect to just what point, the question of responsibility and the placing of that responsibility on an individual, with respect to the alleged subornation of perjury, wasn't it at the point where Mr. Semaan was questioning as to where was Pete Torrest and why wasn't Pete Torrest there, and wasn't it at that time I said, "Mr. Semaan, if you have any questions with respect to any of the statements made or questions asked of Natividad Castilleja, you can ask me because I was there"?

A. "I was in on the conversation; I was responsible for that alleged subornation of perjury."

Q. If any.

A. Yes, sir.

Mr. Barbera: That's all.

Mr. Semaan: That's all.

(Witness excused.)

[fol. 148] HARRY VAN SLYCKE, called as a witness in behalf of the Petitioners, having been duly sworn, testified as follows:

Direct examination.

Question by Mr. Semaan:

Q. Your name, please, sir?

A. Harry Van Slycke.

Q. What is your business or occupation, Mr. Van Slycke?

A. I am News Editor of San Antonio radio station KITE.

Q. In your capacity as News Editor for radio station KITE, were you present at a hearing before the Board of Pardons and Paroles in Austin, Texas, on February 8, 1957, where commutation of sentence was being sought on behalf of Alvaro Alcorta?

A. I was.

Q. Were you present there in your official capacity as a newsman, or just as a spectator?

A. I was there as newsman.

Q. Ordinarily, do you make notes when you are covering a situation like that?

A. Yes, sir.

Q. Did you make notes on that occasion?

A. I did.

Q. I show you these sheets of yellow paper here and ask you what those are (handing papers to witness).

A. These are the notes I took on that day.

[fol. 149] Q. All right, sir. Now, I direct your attention to a point in that hearing when Mr. Green was being questioned by one of several lawyers about taking of statements from witnesses and his investigator taking statements, and when at that point he was accused of suppressing evidence, Mr. Barrera rose to his feet and made a certain statement; do you recall the incident I'm talking about?

A. Yes.

Q. Either from your memory, if it serves you, or relying on your notes as you have them written, tell this Court what you saw and what you heard and go behind that a little if you want to give us a little background and then come up to that.

A. I would like to refer to the notes. I take them so I don't have to rely on my memory.

Q. All right.

A. District Attorney Green was being interrogated. The question asked: "Your policies include, if necessary, suppression of evidence?" His answer was: "Absolutely not." He was then asked to explain how or why Castilleja, who answered that he did not have intercourse when he did have——

Q. Do you remember offhand who was asking those questions?

A. It was either the attorney from Houston or it was Mr. Garcia, one of the two.

Q. Baggenhour or Baggenoff, something like that?

A. Yes, sir. The next question: "Are we not disputing here as to the truth?" Mr. Green's answer was: "I don't understand." At that point my handwriting gets a little [fol. 150] vague. These notes were taken for use that day, not for a long time.

Q. All right.

A. Mr. Green then made a statement in which he said: "My policy is to interrogate witnesses and take statements. There was no suppression by my office." At that point Roy Barrera rose to his feet—Is that what you want now?

Q. Yes.

A. And discussing the interview of Castilleja where Mr. Barrera and Torrest were present, my notes indicate that he said: "I was present at that interview and I take full responsibility." Then Mr. Garcia took over, as Mr. Long indicated, and asked the question: "Did you know before the trial"——

Q. Now who did he ask that question?

A. Roy Barrera.

Q. All right. Mr. Garcia is asking Roy Barrera a question.

A. Yes, sir.

Q. The question is what, sir?

A. "Did you know before the trial that Castilleja had intercourse?" The answer is: "Yes." And then my notes reflect——

Q. Had intercourse with who, Mr. Van Slycke?

A. My notes don't indicate the person, but, of course, for my information it is self evidence to me; whether that is self evidence to this Court, I don't know, but it is to me as a reporter.

[fol. 151] Q. What woman were they talking about?

A. The wife of the defendant, Alcorta; Herlinda I think her name was.

Q. Yes. Then what was said?

A. Then Mr. Barrera made a statement in which he said, "I told Castilleja the statement about intercourse was inadmissible." I'm sure my memory at that point would revive he did add some qualifying statement, but for my news reporting I did not think they were important. They may be important in a legal sense.

Q. Let me show you a copy of the San Antonio Light and ask you——

Mr. Barrera: Before he is asked to see anything from the San Antonio Light, may I take the witness on voir dire to determine whether or not he has specific knowledge of things contained in the San Antonio Light?

The Court: All right, Mr. Barrera. Go ahead.

Mr. Semaan: Your Honor, I want to show him this to see if it refreshes his memory and then go on with the qualifications Mr. Barrera said he made. I want to call the Court's attention to this: On at least two occasions I asked to take the witness on voir dire to bring out certain things and the Court told me I could have the witness on cross examination.

The Court: I rule on each individual question, Mr. Semaan. Mr. Barrera, you may proceed.

[fol. 152] Voir Dire Examination.

Questions by Mr. Barrera:

Q. Mr. Van Slycke, who do you report for, sir?

A. I report for radio station KITE.

Q. And what is your connection, if any, with the San Antonio Light?

A. None whatever.

Q. The notes that you made and the information that you related was to radio station KITE, is that correct?

A. Yes, sir.

Q. And did you give any notes or submit any information to the San Antonio Light, or any of its reporters, with respect to what you did or did not hear at the hearing before the Board?

A. Roy, in addition to reporting for KITE, I also am what is known in the trade as a "stringer" for the Associated Press. I truthfully do not recall whether, on that day, I filed with the A.P. and material out of Austin. I don't believe I did, because it was of such a nature—the hearing was of such nature you couldn't get out of the room. You couldn't get into the room. I think you know what I mean. I don't believe I did. It's possible I did.

Q. Were any reporters there for the Light?

A. None that I recognized. I didn't know Mr. Long.

Q. I see. Have you since been informed that Mr. Long worked for the Light, or possibly a "stringer"?

Mr. Barrera: Do you work strictly for the Light, Mr. Long?

The Court: Don't ask Mr. Long any questions unless he is on the witness stand.

Mr. Barrera: I'm sorry.

A. Unless any information was submitted to the Light——

Q. You don't remember whether you did or not?

A. I feel rather strongly I did not file with the Associated Press, which serves the San Antonio Light.

Q. Consequently, if you should see anything in the San Antonio Light, which you don't remember having submitted, and you feel strongly you did not submit, you not being the reporter for the Light and certainly not being the printer of, or the typesetter, with respect to the information that comes out in the Light, you would not be in a position to refresh your memory from some other source outside of your own notes; is that correct?

A. No, I wouldn't say that, Roy.

Mr. Semaan: I think that is a matter the witness can't say until he sees the other sources and decides for himself whether or not it does refresh his memory.

The Court: The witness can answer if he knows.

A. I would not say that, Roy. I take notes and I might explain that radio reporting is altogether different from press reporting. I take notes on what I think personally important. It is not possible for me to take notes on every word. That does not mean I did not hear it all. That

does not mean my mind was totally blank when I was not [fol. 154] taking notes. If refreshed—— For instance, I heard Mr. Long testify on what you mentioned yourself and it did register, but it is not in my notes.

Mr. Barrera: We submit, your Honor, under the rules of procedure that a witness cannot be asked to refresh his memory from any notes or information, statements or comments that he did not put down in writing himself, or he did not have any personal knowledge of himself. For that reason, we object.

Mr. Semaan: I don't think this witness under any circumstances can tell whether or not anything refreshes his memory until he sees that thing and decides for himself whether or not it does refresh his memory.

Mr. Barrera: It is not permitted under the rules of procedure to attempt——

The Court: Mr. Barrera, your statement of the law of the rules of evidence is correct, but in view of the nature of this hearing, I will allow Mr. Semaan to proceed.

Direct examination (Cont'd).

Questions by Mr. Semaan:

Q. All right. Mr. Van Slycke, I show you a copy of the San Antonio Light, Sunday, February 10, 1957, and I direct your attention to some heavy black print on page 10A and ask you to read that to yourself and see whether or not that refreshes your memory as to any statement made by Mr. Barrera before the Board of Pardons and Paroles on February 8th.

[fol. 155] (Witness looks at newspaper clipping).

Q. Have you read it, Mr. Van Slycke? Does that refresh your memory in any way?

A. In any way? Yes, sir.

Q. Can you tell us, now that your memory has been refreshed, what, in addition to what you have already stated, what else——

A. I'll say that the statement represented here by Mr. Barrera in which it says, "Yes, I told him it was not admissible," that much, I have in my notes. Then the statement goes on: "unless it was brought up as a defense. It had not been raised as a defense. If it had been asked, I

would have objected to it." Those are very familiar words.

Q. Do you remember his having said that?

A. I remember them as having been said by nobody else.

Mr. Semaan: All right. Your witness.

Cross-examination.

Questions by Mr. Barrera:

Q. Mr. Van Slycke, you have stated, sir, that there was a portion of the answer that I gave in answer to Mr. Garcia, and I believe that is reflected in your notes there, wherein I was asked a question, do I admit that I knew about the acts of intercourse and so forth.

A. Yes.

Q. Will you refresh my memory again as to your notes?

A. The question I have here is: "Did you know before the trial that Castilleja had intercourse?" The answer is: "Yes."

[fol. 156] Q. I see. And I believe, as you stated, that your notes reflect no further answer.

A. That's right.

Q. And I believe you also stated, in connection with that, that for the purposes of your news information that you did not consider the remainder of the answer given important, that is, important for your news.

A. For my purpose, it was not necessary.

Q. I see. And, of course, the answer, if any, would not have made the news that it would make by cutting my answer right down at that point.

A. Would you run that by again?

Q. Would the complete answer that I gave before the Board of Pardons and Paroles, would that answer, the complete answer, have made the noteworthy, so to speak, news that it made, chopping my answer in half, so to speak, and putting down only what you have in your notes?

Mr. Semaan: Your Honor, whether or not he thinks is of no concern to this Court. The statement is in the record and they'll consider for whatever purpose——.

The Court: I think the witness has already stated he took

the part of the answer he considered newsworthy. I think he has already answered the question.

A. Newsworthy from a radio reporting standpoint.

The Court: I'll sustain the objection.

A. Mr. Semaan, I wonder if I could make a statement explaining my notes.

[fol. 157] Mr. Semaan: Is it agreed and understood that this is a copy of the original statement taken by Pete Torres from Natividad Castilleja, and this is being substituted for the original, which is now in the possession of the Board of Pardons and Paroles, and in spite of the fact that this copy bears no signatures that the original bore, the signature of the witness on each and every page?

Mr. Barrera: Yes.

The Court: All right.

(Thereupon, copy of Defendant's Exhibit E substituted for original copy of Defendant's Exhibit E and attached hereto.)

Mr. Semaan: Are you through?

Mr. Barrera: Yes. I think he wanted to say something.

Mr. Semaan: It's all right with me if it's all right with the Court. He wants to make a statement of his own.

The Court: All right.

A. I would like to explain the brevity of my notes in connection with that hearing in Austin. I was allowed four three-minute periods on something that took place over a period of all day long and many thousands of words. I have just enough personal pride to want to be able to explain the brevity of my notes. That's all.

Mr. Semaan: All right. Thank you, Mr. Van Slycke.

[fol. 158] The Court: The Court will stand in recess for a period of ten minutes.

(A short recess was then had, at the conclusion of which the following proceedings were had:)

FRED A. SEMAAN, called as a witness in behalf of the Petitioners, being first duly sworn, testified as follows:

Direct Examination.

A. (Mr. Semaan:) My name is Fred A. Semaan. I am the attorney for Alvaro Alcorta in this hearing. I didn't begin representing him until this application for writ of habeas corpus was filed several days ago; I don't remember the exact date. I am the person, who, on the 24th of January—I am the person who took the first, second and third statements from Natividad Castilleja which have been introduced into evidence. And I am speaking now of the second statement taken by me from Natividad Castilleja on January 26, 1956-57. Could I have the Court's permission to change that date? I swore to it as a notary and inadvertently typed in 1956 when it should have been 1957.

The Court: The record will speak for itself.

A. All right. This statement shows that it is—the last typewritten statement states it was sworn to on January 26, 1956. That is my typing and that is a mistake. It should be 1957 instead of 1956. The circumstances under which I took this statement are as follows: I had taken a [fol. 159] statement from this same witness, Castilleja, two days before at the request of Father Francis Duffy, Warden of the Penitentary at Huntsville. Father Duffy brought this man to my office along with the witness' brother. I am speaking of Natividad Castilleja. He and his brother and Alex Coy were brought to my office with Father Duffy where I took the first statement. I took it. I made an original and about four or five copies and gave them all to Father Duffy. My understanding is that he either gave one or all of them to the Board of Pardons and Paroles a few days later; I don't know. But the following day after I took the first statement, on January 25th, I received a telephone call at my home from Susencio Castilleja, the brother of Natividad Castilleja, who told me two men had been to see his brother, Natividad, at work, two men from the Bexar County District Attorney's office, and wanted him to make a written statement and that he refused and wanted my advice as to what his brother should do. I told him to tell his brother to continue to refuse to make a statement to these

men from the District Attorney's office. The next day Natividad and his brother, who telephoned me the night before, came to my office. Natividad told me, in the presence of his brother, what had happened the day before, how a man by the name of Ismael Garza and Pete Torres went to the San Antonio Furniture Company and took him across the street and showed him a paper and insisted that he made a written statement and that he refused. I asked [fol. 160] him if he would make a statement to me regarding all that and he said he would. I put the paper in the typewriter and began typing and then after he told me that, about how these men came to see him and he was called on the loud speaker and I had written all that down, we got down about the last paragraph. We were then discussing the relationship of Natividad Castilleja and the deceased, Herlinda Alcorta. And I stopped typing and I looked at him and I said: "Now, look, Natividad, the fact is and I believe that you had intercourse with Herlinda Alcorta the night she was killed before you took her home and she was stabbed by her husband." I said: "You have admitted acts of intercourse with her on other occasions, and if you had intercourse with her on this occasion"——

Mr. Barrera: Just a minute, Fred. At this time we would like to interpose the objection to the testimony of Mr. Fred Semaan and have the Court restrict the testimony he has given only to the impeachment of the witness, if it does so impeach, and for no other purpose.

Mr. Semaan: That's what I'm going, I so believe.

The Court: I'll so instruct you.

Mr. Semaan: Yes, sir.

A. (Mr. Semaan continuing:) I said: "Now, I think you had intercourse with her that night and you admitted other acts of intercourse." I said: "For goodness sakes, if you did have intercourse with her that night, I want you [fol. 161] to say it." I said: "Now, the truth is you did have, now didn't you, Natividad, have intercourse with her the night she was killed?" His head dropped a little and his chin sort of hit his knees a few seconds and he remained in that position and looked up at me and said: "Yes, it's true, I did have intercourse with her." I wrote that down. When it was finished I gave him a copy and I held a copy. Now, who had the original and who had the

copy, I can't say at this time, but I read it to him and he was looking at the paper as I read it and my assumption is that he was reading along with me. His brother was in the room listening. When I got through I said: "Now, is all that true and correct?" He said: "Yes, it is." And he signed it and I swore him to it, and then I had his brother, Susenio Castilleja sign it as a witness, which he did. Those are the circumstances under which this statement was taken, and I have reference to Defendant's Exhibit B. That's all I have to say about that.

Cross-examination.

Questions by Mr. Barrera:

Q. Mr. Semaan, with respect to the other statement taken by you from Natividad Castilleja on January 24, 1957, which has been introduced into evidence as Defendant's Exhibit C, I call your attention to this particular paragraph here: "I was asked in court during the trial—

A. Yes.

Q. —whether or not I had had intercourse with Herlinda [fol. 162] Alcorta and I said that I had not. I was asked this question by Alvaro Alcorta's lawyer and I knew I was not telling the truth when I said I had never had intercourse with Herlinda Alcorta." Now, Mr. Semaan, in all fairness and all honesty, did Natividad Castilleja make such a statement to you?

A. Yes, sir. In all fairness and all honesty, I asked him if he was asked that question and he said yes; by Mr. Alcorta's lawyer, and whether or not it is true, I don't know, but he told me and I put it in there.

Q. I see.

A. Let me show you something else, Mr. Barrera.

Q. Just a minute. You can answer the questions you want on direct again. You say in all fairness and sincerity you don't know if it's true or not?

A. No, sir, because I wasn't at the trial.

Q. I see. Is this, or is this not a duplicate copy of the original Statement of Facts taken at that trial which has been introduced?

A. I can't say because I wasn't at the trial. I haven't

see the original. I'll be this fair with you, Mr. Barrera. I assume that it is.

Q. Yes. And going on such an assumption, Mr. Semaan, have you had occasion to read the trial record, which you assume to be correct?

[fol. 163] A. Some parts of it. I have read Alcorta's testimony and I have read Castilleja's testimony.

Q. I see. Both direct and cross?

A. Yes, sir.

Q. Have you since determined such a statement by Castilleja is untrue?

A. I have found nowhere in Castilleja's statement where he was asked whether he had intercourse with Herlinda Alcorta. I have found that he was asked on cross examination, by Mr. Lipscomb, whether or not he had ever seen the dead girl out with other men, and the witness answered no.

Q. I see. But, again, I call your attention to this particular statement here: "I was asked in court during the trial whether or not I had had intercourse with Linda Alcorta and I said I had not."

A. Yes, sir.

Q. "I was asked this question by Alvaro Alcorta's lawyer and I knew I was not telling the truth when I said I had never had intercourse with Linda Alcorta."

A. Yes, sir. That's what the witness told me and that's why I put it in there, because I wanted it to be his statement, not mine.

Q. Yes, sir. But you do find, after reading the record which you assume to be correct, that it is not in there.

A. I have stated I didn't find it in there.

Q. And such a question was never asked of him; is that correct?

[fol. 164] A. I don't find it in that copy of the Statement of Facts.

Q. I see.

A. I would like to say this, Mr. Barrera. I also typed out in this statement, as Mr. Castilleja told me, the following: "I want to be clear about this. Torres never actually told me to deny that I had had intercourse with Linda Alcorta. What he told me was this: 'If you want to say it, go on and say it, but if you don't want to say it, then don't

say it.' " That's exactly the way he told it to me, and that's exactly the way I wrote it. If I wanted to cheat or lie, I could have typed in there, "He told me so and so and I did so and so."

Q. Well, I'm sure of that, Mr. Semaan. Let me ask you this other question: Do you know, actually, whether that's true or not; whether what he told you at that time, if he told you, is true or not, having determined that this certainly is not backed up by any of the facts?

A. Mr. Barrera, I know that this is true: That the man has had intercourse with her on many occasions. He told me he had intercourse with her just before she died. I have heard you say that you know that.

Q. I know what?

A. And I don't find it in the Statement of Facts in the trial court.

Q. You say you have heard me say that I knew that he had had intercourse with her on that night?

[fol. 165] A. I have heard you testify and Mr. Green, both, that you all, that you were both aware that Natividad Castilleja had intercourse with the dead girl, that you knew that before the trial, and I don't find that brought out in the Statement of Facts. I further heard you testify under oath that you told him not to volunteer it, but you ask him questions that certainly speak for themselves. And when he denied it, you didn't say a word about his denying it. And I heard you say——

Mr. Green: Your Honor, that's argumentive. That's not the facts.

The Court: Mr. Semaan, I think the objection is well taken. Just answer the questions of Mr. Barrera.

A. All right.

Mr. Lipscomb: I would like to ask just one question: What Barrera meant when he asked Castilleja if he had ever had any dates with the girl.

A. Mr. Lipscomb, I know what I would have meant.

Mr. Barrera: We'll object to that.

Mr. Villarreal: It's up to the Court, I believe, to decide.

A. It's in the record.

The Court: Do you have any other questions, Mr. Barrera?

Mr. Barrera: No further question.

[fol. 166] Redirect examination

A. (Mr. Semaan:) Now, one more thing, Roy. I want to say this about this first statement, Defendant's Exhibit C. Not until after I had completed the statement and the witness had signed it and sworn to it and I took his acknowledgement at the extreme bottom of the page did he tell me or Father Duffy or anyone else that Roy Barrera was present when he, the witness Castilleja, admitted to Torres that he had had intercourse with the deceased on several occasions. I had no more room, as you can see, on that page to put that on there, so I turned it over. He had already signed it and sworn to it, and I had acknowledged it and put the seal on it. I turned it over and I then had him write that in his own hand and sign it on the back of it, and on the back of it he states: "When I told Torres what I had said in this—in i-s statement to me,"— His spelling here is "i-s"; I assume he meant "this", I don't know. —"in this statement, Roy Barrera was present and heard everything that was said." There was no more room to put it on the front, so I had him write it on the back and sign it. That's the reason that appears that way.

Recross examination.

Questions by Mr. Barrera:

Q. Now, Mr. Semaan, you say that Father Duffy got you to take this statement from Castilleja; is that correct?

A. Yes, sir.

[fol. 167] Q. But in truth and in fact, you relayed that information to Father Duffy at the outset; is that correct?

A. It happened this way: Father Duffy came into my office on the date this statement was taken, whatever date that was. It was the day of the San Antonio Bar Association dinner and dance, and my recollection is that was January 24th. I didn't know him and had never seen him before.

Q. I didn't ask you that, Mr. Semaan. What I asked, did you relay the information to Father Duffy?

A. No.

Q. Do you know how Father Duffy knew——

A. I'm trying to explain that. He came into my office in the early afternoon and he introduced himself and he said: "I understand you have certain information about the Alcorta case." I asked him who he was and why he was interested. He told me he was the Chaplain in the penitentiary and he had become interested in Alcorta. I then told him I did have. I said: "I have heard that Natividad Castilleja has told several people, including a client of mine, Alex Coy, that he had intercourse with the dead girl on many occasions, but that in court he denied it and didn't tell the truth." I said: "Now, I have tried to have this boy brought to my office, but he refuses to come." I said: "He being a Catholic and you being a Catholic priest, I think he will tell you if it's true." He then wanted to know how he could find him. I told him I didn't know, but I would get Alex Coy, who probably would know, to take him out [fol. 168] there. I found Alex Coy, got him at work. He came to my office and agreed to take Father Duffy out to see Castilleja. That was in the early afternoon. I then told Father Duffy if he needed someone to take a statement, to call me and I would be happy to do it for him. I told him to call me at the hotel and I would come back to my office.

Q. Then you did relay the information to Father Duffy that Castilleja had purportedly said this.

A. Yes, in that manner I did. However, how he happened to come to me and said he heard I had this information, I don't know where he got that from. But it was true I did have that information.

Q. Those things happen.

A. Yes, the truth will leak out, Mr. Barrera.

Q. Such as it is.

Mr. Barrera: I believe that's all.

(Witness excused.)

Mr. Semaan: The petitioners rest, your Honor.

PETE TORRES, called as a witness in behalf of the State, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Barrera:

Q. Please state your name, sir.
A. Pete N. Torres.
Q. What is your occupation?
A. Investigator with the District Attorney.
Q. How long have you been so employed, sir?
[fol. 169] A. About four years.
Q. Were you employed in such capacity on or about the 19th day of June of 1955, Mr. Torres?
A. Yes, sir, I was.
Q. In the course of such occupation, did you have occasion to investigate the case of The State of Texas against Alvaro Alcorta, charged with murder?
A. Yes, sir, I did.
Q. In the course of such occupation, Mr. Torres, did you have occasion to talk to a witness in this case by the name of Natividad Castilleja?
A. Yes, sir, I did.
Q. Tell the Court in your own words what the substance of that contact with Natividad Castilleja was and has been to the present, sir.
A. I sent a card to the boy, because from police records I understood he was with the deceased.
Q. Let me see if we can possibly make it a little more brief and save some time. Did you have occasion to take a statement from Natividad Castilleja?
A. Yes, sir, I did.
Q. Tell us about that and, as best you recall, when it was you took it and where it was if you recall and who was present.
A. When I took the statement from the boy he was with me by himself. I don't recall the date, but I think it was July 20th.
[fol. 170] Q. All right, sir.
A. I took the statement from him and after reading what he had told me there, I wasn't satisfied that he had told me everything. So I went to your office and I called

you and asked you for advice. I wanted you to read the statement that he had given me to see what you thought about it. I believe by that time the boy had signed the statement. I called you to the side and I told you that I thought the boy had had sexual relations with the woman, although I had asked him about it and he denied it. You and I got to talking to the boy for awhile there and then he finally admitted he had had sexual relations with the girl.

Q. All right. Now, sir, when did he admit he had had these sexual relations with her, or let me ask it this way: Did he ever tell us that he had had sexual relations with Herlinda Alcorta on the night of the homicide?

A. No, sir. He emphatically denied that.

Q. All right. Go ahead, sir.

A. He told us he had had sexual intercourse with Herlinda Alcorta on several occasions, four or five times I believe he said, and that that had occurred on the nights he brought her home from work. I asked the boy if he had ever taken her out anywhere; if he had ever been out with her. He said no, that it always occurred on the times he brought her home from work. I further asked him if he had had sexual intercourse with her that night. He said no, at the time that Alcorta approached him, the girl was telling him to tell his sister not to come after her early to go to [fol. 171] church, but to change the hour, or something.

Mr. Semaan: Pete, I lost track there; at that time, what?

A. When he was with the deceased sitting in the car.

Mr. Semaan: At the time she was killed?

A. Yes, at the time she was killed. That night I believe that he picked her up; she was coming from a dance. And he and some other boy had been to another place and as they were coming home, they saw her walking down the street. They picked her up and brought her home. He dropped off the boy first and brought the girl by the house. They were sitting there in the car and the girl opened the door and she started to get out of the car, and as an afterthought says: "Will you tell your sister,"—something about church tomorrow. And as she was telling him that, they heard crunching of the gravel. She turned around and says: "Here comes Alvaro, let's go." And he said that before he could get started there, Alvaro was in the car.

Q. (Mr. Berrera continuing:) Mr. Torres, let me ask you this, sir. After the statement of Natividad Castilleja was taken, that is, a written statement, and after his admission to us that he had had intercourse with her on four or five times, on the occasions which he indicated and which you have stated, what, if any, conversation was had by and between Castilleja and myself, or between Castilleja and you, or in the presence of yourself by Mr. Castilleja and either one of us?

[fol. 172] A. After he told us about having intercourse with the deceased, he asked both of us: "What if somebody should come over to my house and ask me about it?". Then you, not me, you told him: "You don't have to tell them anything if you don't want to, but you can if you do want to. It's within your rights not to tell if you don't want to, because you don't have to, but if you want to, you can." You told him: "I would prefer if you wouldn't." You explained to him that if he gave a statement there would be controversy as to what he gave them and what he gave us.

Q. At that time an explanation was given to Castilleja, that was with respect to what, sir?

A. If somebody should come to his house and talk to him about that, because you asked him, I think you asked him right before that, if he had told anyone about that; if anyone had been to his house asking about that. He said nobody has talked to him about that except the police and us. He has told no one except us.

Q. That was with respect to what he could do and what I preferred he do if someone should come out and try to take a statement from him at his house.

A. Yes.

Q. What other conversation was had between Costilleja and you and myself, or you and me?

A. Then he asked of us: "What shall I say in court?" You told him: "Whatever they ask you in court, tell the truth to whatever they ask you in court, but don't volunteer anything unless they ask you."

[fol. 173] Q. I see. Now, Mr. Torres, after that occasion, I just presume—I don't know—that you and I or either one of us had further contact with Castilleja.

Mr. Semaán: If he presumes and doesn't know, I object to the question.

Mr. Barrera: In the normal course of the trial and since we put him on as a witness, making the presumption he did talk to him.

Mr. Semaan: I object to anything except the facts he actually knows.

The Court: Sustain the objection.

Q. (Mr. Berrera continuing:) All right. Aside from the actual trial itself, Mr. Torres, and thereafter, did you have occasion to come in contact with or see or talk to Castilleja with respect to the purported facts of this case, or any subsequent purported facts?

A. Yes, sir.

Q. All right. Where did that take place?

A. In the District Attorney's office right prior to the date of the trial, either a day or two before, when going over the facts of the case.

Q. I see. Did you, Mr. Torres, tell Mr. Castilleja anything contrary to what we had told him, or I had told him there in your presence the time before?

A. I never told him anything as to what to say or not to say. You told him everything about what to say or not to say.

[fol. 174] Q. After that, did you have occasion to see Mr. Castilleja on or about the 29th of January, 1957?

A. Is that he date when Garza and I went to the place where he works?

Q. Well, yes, out at the furniture store.

A. Yes, sir.

Q. Did you have occasion to go out there and talk to him?

A. Yes, sir.

Mr. Semaan: Just a minute. That date he gave you was the 29th, is that correct?

A. I don't remember the date, Mr. Semaan.

Mr. Semaan: All right.

Q. Now, Mr. Torres, you went out there and you say Mr. Garza went with you?

A. Yes, sir.

Q. All right. Did you talk to him out there?

A. Yes, sir. Both Garza and I talked to him.

Q. Was anyone else present at the time that you talked to him?

A. There were people there present. They called him from the office through a loud speaker. We went—See, it's a furniture factory. We sat in one of the pieces there away from the hearing of these people. Actually no one there but Castilleja, Garza and myself.

Q. I see. Do you know a man by the name of Suscencio Castilleja?

A. Yes, sir.

Q. Do you recall whether or not he was there all the time, briefly, part of the time, or if you had any conversation with him or not?

[fol. 175] A. Towards the latter part we went across the street to get a paper and Suscencio was over at the coffee shop getting coffee, having coffee, or going to have coffee. We met him there.

Q. Going back to the first time you met him there and Castilleja was called out and you and Garza had a conversation with him, tell the Court the substance of your conversation with him, your conversation with him, and your or Mr. Garza's conversation with him, but in his presence.

A. The substance of the conversation was, we understood he had given Fred Semaan a statement the day before. And he kind of looked at us blank and didn't say yes or not. And we told him it was in the newspaper. He said: "No, it can't be in the newspaper." I told him: "Well, it is in the newspaper that you gave a statement. I would like to have you tell me what you actually told Semaan. Of course, what is in the paper is one thing. What you told Semaan is another thing. I would like for you to tell us what you told Semaan." He was reluctant about it. He wouldn't believe it was in the paper. He said: "Father Duffy and Seamaan told me they wanted it for their own information, that they wouldn't publish it." He wouldn't believe it. Then we went across the street and got a newspaper and showed him in the Light where it was printed on the front page. He was rather indignant about it because they had promised him it wouldn't be published. Then he started talking about it. In the paper it said he had intercourse with Herlinda Alcorta on the night of the killing. I asked him: "Did you tell him that?" He said: [fol. 176] "No, I told them I had intercourse on the prior occasions, but not on the night of the murder."

Q. Just a minute, Mr. Torres. Now, you say you talked

to him on the 25th of January, or the day after this purported statement by him?

A. The day that thing was in the Light. I talked to him only that one time except saying hello to him in court here today.

Q. And you say at that time you showed him a newspaper article, which article purported to say that Natividad Castilleja had made a statement in which he admitted having intercourse with the girl on the night of the homicide?

A. That's right.

Q. I see. And you don't recall the date.

A. I don't recall the date, but it was the date that it was in the newspaper, which was the day after he had given the statement there.

Mr. Semaan: Well, Pete, it was the 25th for your information.

Mr. Barrera: The 25th. Will you stipulate it was the 25th?

Mr. Semaan: Yes, if he went there the next day because I took that on the 24th, and the second one on the 26th.

Q. You say the newspaper article in the Light purported to say the statement taken or given by Natividad Castilleja on the 24th said that he, Castilleja, had admitted he had had intercourse with Herlinda Alcorta on prior occasions [fol. 177] and, specifically, on the night of the homicide?

A. That's right.

Q. All right, sir. Go ahead.

A. He told us that he hadn't said that. He didn't know why that was in the newspaper. That he had told Father Duffy and Fred Semaan that he had intercourse with her on prior occasions, but not on the night of the homicide. Then he went on telling me that he got in contact with Father Duffy and Fred Semaan through Coy, that Coy had been pressing him to get in touch with Semaan.

Q. Coy who, if you know?

A. I don't know what the man's first name is——

Q. Alex Coy?

A. —but he works at the furniture store and he is the brother of Rudy Coy.

Q. All right.

A. He went on to tell me that Father Duffy had been

over to his house and told him that if Alcorta was to die for this, it would be on his conscience for the rest of his days, because it would be his fault if he died, if he didn't do anything about it. That's why he gave the statement. I asked if he would give us the statement he gave Semaan, not change anything, just the way he gave it to Semaan. He said he didn't know whether he should or not, because the man told him not to. Then we talked to his brother and told him we didn't want him to say anything different from what he told Semaan, that we wanted exactly what [fol. 178] he told Semaan and Father Duffy. And his brother said: "I'll call you tomorrow and let you know." He told Garza that he would call him the following day. Whether he did or didn't, I don't know.

Q. You have no personal knowledge of it?

A. No, sir.

Q. Let me ask you this: Did you ever take a written statement from Natividad Castilleja after the date you have told us you talked to him?

A. No, sir, other than the one I took on July 20, 1955, I never took a statement from him.

Mr. Barrera: I believe that is all, Mr. Torres.

Cross-examination

Questions by Mr. Semaan:

Q. Pete, you all were talking to him at the factory about what he told me and he said he told me and Father Duffy —well, admitted several acts of intercourse several nights previous to the killing, but denied intercourse the night of the killing.

A. That's right.

Q. And you talked back and forth about intercourse for some time.

A. We talked about the statement.

Q. And about when he had intercourse with her.

A. Yes, sir.

Q. Whether it was on the night of the killing, before the night of the killing, and several acts of intercourse.

A. Yes, sir.

[fol. 179] Q. And where the intercourse took place and and all of that sort of thing.

A. I don't believe I asked him where the intercourse took place, because he told me that a year or so before.

Q. You discussed the subject of intercourse quite extensively, as to when it took place and——.

A. When it took place, we discussed that.

Q. —he didn't have a bit of trouble understanding the word "intercourse" and understanding what you meant by that?

A. We were talking to him in Spanish.

Q. But you do say you used the word "intercourse."

A. Mr. Semaan, we were talking to him in Spanish and used the word "chapete" if I recall right.

Q. Yes, but he did tell you, when you first took the statement from him, that he had had intercourse with this girl some four or five times, more or less, I don't know.

A. You are talking about the statement I took July 20, 1955?

Q. Yes.

A. I haven't read the statement, Mr. Semaan. I don't know just what I put in there. I would have to see it to refresh my memory.

Q. I believe it's in evidence (handing copy of statement to the witness). Is that a copy of the statement you took from him, Pete?

A. Yes, sir.

[fol. 180] Q. Anywhere in there, do you set out that he admitted four or five acts of intercourse with the dead girl?

A. Let me read this. I forget what I said.

Q. I can save you the trouble. It's not in there.

A. Well——

Mr. Barrera: We'll stipulate it's not in there.

The Court: I think the State already stipulated it's not in there.

Mr. Barrera: I have read it, Pete. It's not in there.

A. All right.

Q. He did tell you when you interviewed him as a witness, in your capacity as an investigator, that he had had intercourse with her at least four or five times?

A. Yes, sir.

Q. You didn't put it in there?

A. I had taken the statement from him before he told us that.

Q. You didn't take another statement and add it?

A. No, sir.

Q. But you did have that information?

A. Yes, sir.

Q. You had knowledge of the fact he had had intercourse with the dead girl?

A. Yes, sir.

Q. Did you sit in the courtroom during the trial?

A. Yes, sir.

[fol. 181] Q. Did you hear Mr. Barrera ask the witnesses these questions? Did you hear Roy Barrera, on direct examination, ask the witness the following questions: "Natividad, were you in love with Herlinda?"

A. Mr. Semaan, I will not swear to that, because I was in and out of the courtroom.

Q. Did you hear the witness answer, "No"?

A. I won't swear that I was in the courtroom when he was testifying.

Q. Were you in the courtroom when Barrera asked him this question: "Was she in love with you?"

A. I cannot swear I was in the courtroom when he testified.

Q. Were you present when the witness answered, "No"?

A. I can't testfy to that.

Q. Were you present in the courtroom when Barrera asked this question: "Had you ever talked about love?"

A. I still can't testify whether I heard that or not.

Q. And Natividad answered, "No"?

A. The same answer.

Q. Did you hear Mr. Barrera ask this question: "Had you ever had any dates with her other than to take her home?" Did you hear him ask that?

A. I wouldn't say yes or not, Mr. Semaan. I was in and out of the courtroom.

Q. But you will say that you never informed the defendant's attorney of the fact that Castilleja had told you that he had had intercourse with this girl four or five [fol. 182] times at least?

A. No, sir. I wrote my report and it's included in my report.

Q. And you didn't tell the judge?
A. After I turned the case in, that's the end of it as far as I'm concerned.
Q. The only person you told was Roy Barrera?
A. No, sir, it's in my report.
Q. The only person you told through word of mouth was Roy Berrera?
A. I don't think I told anyone, Mr. Semaan. Mr. Barrera was there. He was present when he told us that.
Q. Didn't you say on direct examination today that after you took the written statement you had some doubt and that you kept pressing the boy and he finally told you?
A. Mr. Barrera and I both questioned him and he told both of us. He admitted it to both of us.
Q. Then Barrera was present when he admitted that?
A. Yes, sir, he told both of us.
Q. Did you tell Mr. Green about that?
A. I had it in my report, Mr. Semaan.
Q. But did you tell him? I know you had it in your report.
A. I don't think I told anybody about it. I write my report and they read it.
Q. Your answer is, you didn't tell anyone?
A. That's right.
[fols. 183-186] Q. Either before the trial or after?
A. Either before the trial or after.

Mr. Semaan: That's all.
Mr. Barrera: I believe that's all, Mr. Torres.

(Witness excused.)

[fol. 187] Ismael Garza, called as a witness in behalf of the State, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. Barrera:

Q. Please state your name, please.
A. Ismael Garza.
Q. What is your occupation?
A. Investigator in the District Attorney's office.
Q. Specifically, what is your position, sir?

A. I'm the Chief Investigator.

Q. And how long have you been employed as investigator with the District Attorney's office, Mr. Garza?

A. About six years.

Q. And is that a continuous course of occupation, or have you intermittently been with the District Attorney's office and left and then been back?

A. I was there about two and a half years and left and then came back. I have been there about three years now. [fol. 188] Q. About three years this last tenure, is that correct?

A. That's correct.

Q. Mr. Garza, if you recall and if you remember, sir, were you employed as an investigator with the District Attorney's office on or about the 19th day of June of 1955?

A. I was.

Q. And did you have any connection, as an investigator, with the investigation and or course and conduct of the case of The State of Texas versus Alvaro Alcorta at the time of the trial?

A. No, sir.

Q. Mr. Garza, since you have been in the District Attorney's office, and subsequent thereto, have you had occasion to talk to a man by the name of Natividad Castilleja with respect to statements or purported statements made by him, with respect to this case?

A. I have.

Q. And when did you have occasion to talk to him, sir, for the first time?

A. On January 25th.

Q. And where did you talk to him, sir?

A. At his place of employment on San Pedro.

Q. Is that a furniture store out there?

A. Furniture store, yes, sir.

Q. At the time you talked to him, sir, were you alone or with someone?

[fol. 189] A. Pete Torres was with me.

Q. I see. Now, Mr. Garza, would you please tell us the sum and substance of the conversation, if any, that may have occurred between you and Natividad Castilleja or Mr. Torres, but in your presence?

A. Yes, sir. We went there about 2:30 in the afternoon

and asked him if he had made a statement to Mr. Semaan, and if he did, we wanted to know just what he has stated in his statement. And he told me that he had made a statement and we further asked him, or I asked him, if he had stated as was in the paper. He said he didn't know what was in the paper. We asked him if he would walk across the street with us and we would read the paper, and he finally did. At first he didn't want to, and then he said, "All right, I'll go."

Q. Speak just a little louder, Mr. Garza.

A. He walked across the street with us and we bought a paper. In reading the statement of the paper, we asked him if that was his statement, and we asked him if he had stated that he had had relations with Herlinda Alcorta, and he said that he had told Mr. Semaan that.

Q. All right.

A. We asked him if he had stated he had had intercourse with Herlinda Alcorta on the night of this killing and he said he did not.

[fol. 190] Q. Did such statement purport to appear in the paper that he had?

Mr. Semaan: That would be hearsay. The paper would be the best evidence.

The Court: Mr. Semaan, if you want to make an objection, stand on your feet so we'll know if you are making an objection or aside bar remark.

Mr. Semaan: Yes, sir, your Honor. I object to that because the paper would be the best evidence. I think your question was, did such statement appear in the paper.

Mr. Barrera: Yes.

Mr. Semaan: I object to that as being hearsay on his part and the paper itself would be the best evidence.

The Court: I'll sustain the objection.

Mr. Barrera: May it please the Court, with respect to the paper, certainly, we know it's hearsay, but that was the basis of the questioning of Natividad Castilleja: whether he had made the statements appearing in the paper, and that such statement appeared in the paper and, as a result thereof, had he made such statement. Not whether it was true or false, but had he made the statement appearing in the newspaper. That is something

testified by Natividad Castilleja here and certainly it was opened and I think it is proper to go in to it.

Mr. Semaan: Oh, no, not opened your Honor. They objected very strenuously to references I made to newspaper stories myself. I say for whatever purpose he is referring to newspaper stories, the story in the paper itself is the best evidence.

[fol. 191] The Court: I'll sustain the objection, Mr. Berrera.

Mr. Barrera: All right, sir.

Q. (Mr. Barrera continuing:) Mr. Garza, in an effort to refresh the memory of Natividad Castilleja, as to whether he had or had not made any such statement as appeared in the paper, did you have occasion to show him the paper?

A. I did.

Q. Did he read the paper?

A: Yes, sir.

Q. Did that refresh his memory as to whether or not he had made the statement appearing in the paper or not?

A. Yes, sir, except with a certain paragraph in the paper he said he did not make.

Q. I see.

Mr. Semaán: I have no objection to this as long as it is understood the witness, nor the District Attorney, nor anyone else, is vouching for what the paper contained.

Mr. Barrera: We certainly do not vouch for anything that appears in the paper.

Mr. Semaan: No, no, what I'm saying is that if you are trying to get this newspaper in through the back door, I'm objecting to that. The objection has been made and sustained that the story, the paper, the article itself, is the best evidence. He's again asking questions based on what the witness saw in the paper and I still say the paper is the best evidence.

[fol. 192] The Court: That wasn't your original objection.

(Conference between attorneys and the Court at the Court's bench.)

Mr. Barrera: We won't press it any further, Mr. Semaan.

Q. (Mr. Barrera continuing:) Now, Mr. Garza, in any event, did you ask Natividad Castilleja whether he had told Fred Semaan that he had had intercourse with Herlinda Alcorta on the night of the homicide?

A. I did.

Q. What was his answer?

A. He said he did not tell Mr. Semaan that he had had intercourse that night with Herlinda Alcorta.

Q. I see. Now, did you then attempt, Mr. Garza, to have Mr. Castilleja give you a written statement?

A. I did.

Q. And did you succeed in such efforts?

A. No, sir.

Q. And from your conversation with Castilleja and based upon such conversation, did he tell you why he would not give you a written statement?

A. Yes, sir.

Q. What did he tell you, sir?

A. He told me they had told him not to make a statement.

Q. Did he indicate who "they" meant?

A. Mr. Semaan.

[fol. 193] Q. And Mr. Garza, did you ever succeed in getting a written statement from Mr. Castilleja?

A. No, sir.

Q. What, if anything, else was the substance of your conversation there with Natividad Castilleja?

A. We asked him if he had told Mr. Semaan that he was embracing or kissing Herlinda Alcorta at the time of the killing, and he said no.

Q. And is there anything else you can remember, if you remember? If not, why, it's all right.

A. That's about it. We asked him if he had stated that he had had intercourse with her. He stated he had stated to Mr. Semaan four or five times and that his brother was present. And his brother, Suscencio, was present at the time we were questioning Natividad. At the latter part of our conversation Susencio came up. It was during the time I asked him if he had told Mr. Semaan whether he had had intercourse with Herlinda on the night of the killing. And I further told him: "Well, you didn't tell him that?" He said: "I didn't tell him that." I said: "Well, it's in the

RULING OF COURT

The Court: Yes. Gentlemen, after considering the testimony that has been offered here today, as well as the exhibits that have been offered, including the Statement of Facts on the original Alcorta trial, it is the opinion of this Court that the Application for Writ of Habeas Corpus should be denied and the defendant remanded to the State Penitentiary at Huntsville, Texas.

(Thereupon, the hearing adjourned.)

[fol. 199] APPROVAL OF THE COURT OF RECORD

The foregoing transcript in question and answer form of the proceedings had and evidence adduced in the hearing of Cause No. S-93, styled Ex Parte Alvaro Alcorta, heard before me in the Criminal District Court No. 2, of Bexar County, Texas, on the 21st day of February, A. D. 1957, having been examined and approved by the attorneys of record for the State and Petitioners in said cause, is by me hereby approved and ordered filed as the official statement of facts in said cause.

Witness my hand this 2nd day of March, A. D. 1957.

John F. Onion, Jr., Judge Criminal District Court No. 2 Bexar County, Texas

statement." His brother said: "If it's in the statement, I read the statement and I didn't see it in the statement."

Mr. Barrera: All right. I believe that's all.

[fol. 194] Cross-examination.

Questions by Mr. Semaan:

Q. Mr. Garza, you as an investigator for the District Attorney, and other investigators for the District Attorney, I think you have heard Mr. Torres and Mr. Barrera both say today that they advised Castilleja not to give anyone else a statement if they came out to their house. There's nothing so horrible about that, is there; you do that in every case, don't you?

A. No, sir.

Q. Have you ever—You mean—Let me put it this way. You have never told a witness: "Now, if the other side comes to see you, I advise you not to talk to them"?

A. No, sir. I tell them they can talk to them if they want to, but they don't have to. Just like they don't have to talk to me if they don't want to.

Q. You feel it's all right to tell them that?

A. Yes, sir.

Q. Nothing is wrong with it?

A. That's right.

Q. Don't I have just as much right to tell that same witness——

Mr. Barrera: Just a minute. That's argumentative. We object to it.

The Court: Sustain the objection.

Mr. Semaan: I just want to say this, Mr. Garza. I wish you had been on the Alcorta case, Mr. Garza, and we wouldn't have been here today.

[fols. 195-198] Mr. Barrera: I want to say, Mr. Garza—with all due respect to you, Mr. Garza, I think the Alcorta case was well investigated. Thank you.

(Witness excused.)

(Conference between attorneys and the Court at the Court's bench.)

[fol. 200] DEFENDANT'S EXHIBIT "A"

HUBERT W. GREEN, JR.
Criminal District Attorney
Of Bexar County
Courthouse
San Antonio 5, Texas

January 29, 1957

In Reply Please Refer To:

Board of Pardons and Paroles
Box 2176, Capitol Station
Austin 11, Texas

Before me, the undersigned authority, on this day personally appeared Roy R. Barrera, who after being by me duly sworn and upon oath, deposes and says:

My name is Roy R. Barrera. I am an Assistant District Attorney of Bexar County, Texas, and have been so employed since June 15, 1951.

During the Course of my employment here and on or about the 19th day of June, 1955, I had occasion to work on and partially investigate the case of The State of Texas Vs. Alvaro Alcorta. I was present at the questioning and participated, to some extent, in the questioning of this defendant at the time of his apprehension, which questioning led up to an ultimate confession on his part. The confession was introduced into evidence at the trial of this case. From the confession, which was taken in the presence of reporters and other entirely and totally disinterested witnesses, it can be seen that Alvero never at any time indicated that he had any knowledge of any specific acts of misconduct on the part of his wife with anyone.

Subsequent to the taking of this confession by Mr. Pete Torres, Investigator for this office, I had occasion to be present at the time that Mr. Torres was in the process of winding up the taking of a written statement from Natividad Castilleja. Before Castilleja signed such statement, Mr. Torres asked would I read it and give him a legal opinion with respect to its contents. I read it fully and further questioned him as to the truth of its contents.

He verified that the statements contained therein were true. There was nothing in this statement with respect to his ever having had sexual intercourse with the deceased, Herlinda Alcorta. Mr. Pete Torres and I pressed him further and stronger about prior sexual relations with the deceased in this case, and after a short time, he finally admitted to Mr. Torres and I that he had had sexual relations with her approximately four or five times, the last time having occurred approximately one or two months before the night of the homicide. He denied emphatically that there had been any misconduct on his or her part on the night of the homicide. We inquired of him if on the occasions that he had intercourse with her they had dated out to night [fol. 201] clubs, tourist courts, drive-ins, etc. He denied that he had ever dated her, and that these acts of intercourse had taken place on occasions when he had brought her home from work and on the way home from work.

Being reasonably satisfied that this was the sum total of his testimony, and I being satisfied that as a legal proposition, the defendant, Alcorta, not having any prior knowledge of these prior acts of intercourse, could not have introduced evidence to show that such acts had taken place to justify his state of mind on that occasion, for it is a well-accepted proposition of law that the defendant could not have been affected, nor could he enter as his motive for his killing, any facts about which he had no knowledge. This being the proposition, and on the possibility that if Natividad, due to the circumstances surrounding his position as a witness, should have changed his testimony or if there was need of refreshing his memory from the statement given, and since he was reluctant to sign this statement if the facts about the intercourse were stated therein, I instructed Mr. Torres to leave out of said statement his statement about prior acts of intercourse, and, again I repeat, he never at any time stated that he had intercourse with her on the night of the homicide.

The statement having been completed, I inquired of him as to whether or not anyone else had talked to him about the facts of this case, to which he answered that no one had as yet approached him. At that time, he asked me and Mr. Torres what should he do or say if someone wanted a statement from him, to which I answered that he could

give them a statement if he wanted to, but, certainly, he did not have to. Needless to say, I further told him that I preferred that he did not, in view of my past experiences with defense attorneys taking statements from witnesses such as this, vital to a State's case and who, by force of circumstances, are often times not overly bright. Whereupon the result is that on the trial of the case, the State finds itself faced with a statement given by the same witness, in which he has alleged statements entirely to the contrary, and these statements appear over his signature, and though he may vehemently deny that he made the statements contained in the second statement, they are nevertheless to be found therein and over his signature.

He further asked me what he should say if he should be asked about whether he did or did not have intercourse with Herlinda Alcorta as he had informed us he had. I told him at this time, in the presence of Mr. Torres that in that event, and in any event, he should tell the truth on the stand, but not to volunteer any information or to answer any question that was not specifically asked of him. As a matter of law I did not feel obligated to ask him this question on the stand, again in view of the fact that even the defendant, while he was on the stand, testified, generally, that he knew his wife was running around, but that he had never seen her in any act of misconduct with anyone.

The witness was never asked on cross-examination whether or not he had ever had intercourse with Herlinda Alcorta, but should he have been asked this question, the State would have properly objected to any answer for the [fol. 202] reasons heretofore stated that such facts were not known to the defendant at the time of the homicide and, therefore, could not have contributed to his motive or his state of mind at the time of the homicide.

I wish to further state that at the time that his case came to trial, I fully realized the import of the testimony that was available to the State and of the gravity of the situation facing Alvaro Alcorta, and in view of this, I personally requested Mr. Richard J. Woods, First Assistant Attorney, to prevail upon Judge Joe E. Brown, to secure or at least offer to secure additional counsel for Alvaro Alcorta to such an extent that I expressed, in no uncertain terms, to Mr. Hubert W. Green, Jr., the District Attorney, and to

Mr. Richard J. Woods that if this request on my part was not followed or that at least the effort to get the defendant additional counsel was not made, that I wanted nothing to do with the prosecution of this case. I personally talked to Judge Joe F. Brown on two occasions during which time he told me that he could not judicially determine that Mr. Lipscomb was incompetent as a defense attorney, and at which time I answered that it was not a matter of Mr. Lipscomb's competency or incompetency, but simply a matter of the Court appointing someone to assist him in view of the fact that the State was going to ask for the death penalty in this case, and attempting on my part to give the defendant the benefit of two attorneys, although he may have been able to employ only one.

It is my understanding that Judge Joe F. Brown offered to appoint counsel to assist Mr. Lipscomb to the point where Judge Brown had already informed Manuel Lopez, a local attorney, that he was going to appoint him to assist Mr. Lipscomb if Mr. Lipscomb and or the defendant had no objection. In any event, it is my understanding that Mr. Lipscomb refused the offer or such assistance. Whether or not this was done in the presence of the defendant, I do not know. I could do no more that what I did.

For the record, let me further state that I seriously question the good faith of the attorney who just "happened" to be at hand to assist Father Duffy in the taking of this alleged "contradictory" statement, though I find nothing "contradictory" in it, and after a thorough examination of the questions asked and the answers given by Natividad Castilleja, I fail to see where he committed perjury as he now states that he did in the alleged "truthful" statement taken from him by this defense attorney.

Approximately two and half to three months before Father Duffy, in a last minute effort to save the defendant's life, happened upon this information and upon this attorney, this same attorney had contacted Mr. Pete Tijerina, another local attorney, who was at that time president of the Lulacs. Mr. Tijerina informed me at that time that this defense attorney had come to him requesting or asking Mr. Tijerina to get the Lulac Club behind Alvaro Alcorta in an effort to commute his sentence to life, and at that time, he informed Mr. Tijerina that he had or could

get this same alleged "contradictory" statement from [fol. 203] Castilleja for Mr. Tijerina, further alleging that the representatives of the District Attorney's Office had caused Mr. Castilleja to perjure himself on the witness stand. Mr. Tijerina informed me that he told this defense attorney that if he had or could get such information that he should handle it himself and not get the Lulacs involved in that type of transaction. Nothing was ever done by this defense attorney to my knowledge until Father Duffy "happened" to meet him at a Bar luncheon just days before Alcorta's second stay was about to expire.

It further "happens" that this same defense attorney represented a defendant by the name of Rudy Coy, who was assessed a ten-year sentence for murder, after two hard-fought trials, and it just so "happens" that Coy's brother, Alex Coy, "happened" to be working with Natividad Castilleja at the same place of employment.

It is not uncommon to have a situation such as this arise, and I am not surprised in the instant case, and I certainly do believe that the Board, and properly so, should look thoroughly into all of the facts and circumstances surrounding the alleged "contradictory" statement now given by Castilleja. Let me further state that I am firmly convinced that Father Duffy is acting in utter good faith in what he believes to be the facts in view of the alleged "contradictory" statement, but I am also firmly convinced that the reasons and motives behind the giving of such a statement by Castilleja at this late hour are to be seriously questioned. Castilleja has informed investigators for this office that he was told that it was his fault that this woman had been killed by her husband, and that it would be his fault if Alcorta went to the chair, and that this would be on his conscience for the rest of his life. I seriously doubt that any person placed under the same or similar circumstances would not be willing to give a "contradictory" statement whether true of untrue to any facts theretofore testified to by him. It is my sincere feeling that the defense attorney who just "happened" to be available to Father Duffy at this late hour feels that if this defendant, Alcorta, under the brutal set of facts surrounding this killing does not get the penalty

imposed by the jury that never again will any defendant be deserving of the death penalty in any case regardless of the facts, at least in Bexar County, and this is where he practices law principally as a defense attorney.

I sincerely appreciate and respect the position of the Board with respect to this matter, and I am sure that the Board will consider all facets of this "contradictory" statement in arriving at a fair and just decision, both for Alcorta and for the family of the deceased and the residents of this community.

Very respectfully,

Roy R. Barrera Ass't. Criminal District Attorney
Bexar County, Texas

Sworn and subscribed to before me this 29 day of Jan. 1957.

Emma C. Anderson, Notary Public, in and for Bexar County, Texas

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[fol. 204] DEFENDANT'S EXHIBIT "B"

STATE OF TEXAS,
County of Bexar:

January 26, 1957

Before me the undersigned authority personally appeared Natividad Castilleja, who, after being by me first duly sworn, on his oath deposes and says:

My name is Natividad Castilleja. I am the same Natividad Castilleja who made a statement for Father Francis Duffy concerning my testimony in the trial of Alvaro Alcorta.

Yesterday at around 1:30 or 2 p.m. Two men came to my work at The San Antonio Furniture Company. One was Pete Torres from the District Attorneys office. The other man was also from the District Attorneys office and I know him to be Ismael Garza. I had never talked to Garza about the Alcorta case. I had talked to him about the case where a boy named Lucas was stabbed to death. I was a witness in the Lucas case.

I was called on the loud speaker to come to the show room. I went there and found Torres and Garza waiting for me. They asked me over and over just what the words were that I told Fred Semaan in the statement that I made to him for Father Duffy. They also wanted to know if Father Duffy had come to my home and asked me to make a statement. I told him that Father Duffy did come to my home and asked me to make a statement and asked me to go with him to a lawyer and make the statement. They then asked me to tell them what I had said in the statement and asked me to make the same statement to them. I told them that I didn't want to make no more statements. I did tell them that I told Father Duffy and Semman just what I had told Torres about me and Alcortas wife and my relations with her. They kept asking me to make a statement to them and I refused. They then kept asking me what I had said in my statement to Father Duffy and I said "Well I told you that I told them just what I told you when I talked to the investigator before the trial started". They also asked me if Semaan had told me not to talk to them after he took the statement for father Duffy. I told them that Semaan had told me in front of Father Duffy that I did not have to talk to anyone in the District Attorneys office and if I didn't want to talk to them to tell them so and to refuse to talk to them. Semaan also told me that he would protect me and defend me free if I had any trouble with anyone or if any charges were filed against me for telling the truth about my relations with Alcortas wife. Semaan told me he would defend me free of charge. My brother was present and heard some part of the conversation I had with Torres and Garza. He did not hear it all because he was not present when I first started talking to them. They kept trying to get me to make a written statement and I kept refusing. They told me that they just wanted a short statement saying what I had told Father Duffy and I still refused. They then told me that my statement to Father Duffy was in the paper and they wanted me to go with them to buy a paper. I told them I didn't have to go with them to get a paper, that they could go get one and show it to me. Finally I agreed to go with them to get a paper.

We walked across the street to a drugstore and they got a paper and read it to me and I read it too.

Garza and Torres asked me if I had said in my statement to Father Duffy that I had had sexual intercourse with Alcortas wife the night she was killed. The truth it just like I told Father Duffy I did have intercourse with her that night and other nights. They then told me to phone them the next day to let them know if I was going to make a statement for them. I told them I would let them know. Instead I had my brother phone Semaan at his home last night. Semaan told my brother to tell me not to make a statement but to come to his office the next morning and I did. Semaan then asked me to make this further statement to him. He told me that I didn't have to make a statement to the district attorney unless I wanted to. He advised me not to make a statement and told me again that he would defend me free of charge just like he promised Father Duffy he would do if I had any trouble. This statement was made in the presence of my brother. It is all true and correct.

Natividad Castilleja.

Sworn to Jan. 26, 1956, Fred A. Semaan.

Witness, Susecneio Castilleja
(Seal)

[fol. 205] DEFENDANT'S EXHIBIT "C"

STATE OF TEXAS,
County of Bexar:

Before me, the undersigned authority, personally appeared Natividad Castilleja, Who after being by me first duly sworn, on his oath deposes and says:

My name is Natividad Castilleja. I live at 1721 Brunswick street in San Antonio, Texas. I am 20 years old. I am single.

I knew Linda Alcorta before her death. She was the wife of Alvaro Alcorta. I had known her for about a month or a month and a half before she died. I furst met

her at a dance at the Los Angeles Night Club. I knew that she was married because she told me she was married.

Not long after I started taking her home I began having intercourse with her. By that I mean I had sexual intercourse with her. I am not sure as to exactly how many times I had intercourse with her but it would be safe to say about four or five times.

Linda Alcorta told me many things about her husband. I can't remember of lot of things she said about him. I do remember though that she said she did not care for him because he never gave her any money for the kids.

About a month before I started going with Linda Alcorta I saw another man bring her home. He did not bring her right to her house. he dropped her off about two blocks away and she walked home from there. I saw this myself. When she got home Alvaro Alcorta was waiting for her. I heard him ask her where she had been. I heard him tell her that it was too late to be out. I did not hear her answer to him. (My mother told me later that Alvaro Alcorta beat her up about this but I didnt see it myself.)

Before Alvaro Alcorta was tried I was interviewed by members of the District Attorneys Office. I talked to an investigator by the name of Torres. I told Torrest just what I have said in this statement. I told him that I had intercourse with Linda Alcorta. I did not tell him about seeing her with the other man. Torres told me that I didnt have to tell about my having had intercourse with Linda Alcorta unless i wanted to. I didnt tell this in court because I didnt want to say it in front of all those people.

I was asked in court during the trial whether or not I had had intercourse with Linda Alcorta and I said that I had not. I was asked this question by Alvaro Alcortas lawyer and I knew I was not telling the truth when I said that I had never had intercourse with Linda Alcorta.

I want to be clear about this. Torres never actuall told me to deny that I had had intercourse with Linda Alcorto. What he told me was this "If you want to say it go on and say it, but if you dont want to say it then dont say it." He was talking about the testimony that I was to give when I was called as a witness in court. I

had already admitted to Torres that I had had intercourse with Linda Alcorta and he knew that I had. What I am saying now is regarding what I was to say when I took the witness stand.

Alex Coy is the first person I told about this. On second thought I will say that I told me brother Ausencio Castilleja first. After that I told Alex Coy. I also told Father Francis Duffy about this. I told Father Duffy about this for the first time today, January 24, 1957. Father Duffy came to my home today with Alex Coy. After Father Duffy talked to me I admitted to him what I have said in this statement. Father Duffy then asked me to go to a lawyers office with him and make this statement under oath. I agreed and I went with Father Duffy and Alex Coy and my brother to the office of Fred A. Semaan where I made this statement. I want to say that Fred A. Semaan, before he took this statement from me, told me that he wanted the truth. He told me that he did not care who was hurt so long as I told the truth and he told me further he did not want me to say one word that was not true. He told me that in fairness to Alvaro Alcorta he wanted all the truth and told me that under no circumstances should I tell a lie even to keep Alvaro Alcorta from going to the chair. I made this statement to Fred A. Semaan in the presence of Father Duffy, Alex Coy and my brother. I have read it over before signing it and I find it to be true and correct.

Natividad Castilleja.

Sworn to before me Jan. 24, 1957
Fred A. Semaan, Notary Public, Bexar County, Texas.

When I told Torres what I had said in is statement Roy Barrera was prest and herd everything that was said

Natividad Castilleja.

[fol. 206] DEFENDANT'S EXHIBIT "D"

Feb. 19, 1957

if Roy barrera had not told me that I did not have to admit I hades intercoure with herlinda I would have told the truth and told the jury how many time I had intercoure with herlinda

I had seen herlinda in a car with other man but I told the jury that I had not seen her with other men

Natividad Castilleja.

Fred A. Semaan.
(Copy illegible.)
F. J. Baskin

[fol. 207] DEFENDANT'S EXHIBIT "E"

8:45 A.M., 7-20-55 by Pete N. Torres, Investigator for the Criminal D. A. Statement taken in the D. A's. Office

Filed by D. A. 1-29-57

STATE OF TEXAS

vs.

ALVARO ALCORTA

THE STATE OF TEXAS:
County of BEXAR:

Before me, the undersigned authority in and for the State and County aforesaid, on this day personally appeared Natividad Castilleja who being by me first duly sworn upon his oath deposes and says:

My name is Natividad Castilleja. I'm 18 years of age, I'm single and I live with my grandmother at 1721 Brunswick St., San Antonio, Texas. I'm employed at the San Antonio Furniture Co., 702 San Pedro Ave., as a furniture finisher.

I had known Herlinda Alcorta for about two months before she was killed. Herlinda was a good friend of my sister, Delfina Cabrera, and it was at my sister's house

that I met Herlinda. I used to see her at my sister's and we would talk. One time, about two or three weeks before she was killed, we were talking at my sister's and she told me that she was working late and that she got off work at midnight. I told her that I was working at the Woodlawn Bowling Lanes at night and that I got off at 11:30 and that I would give her a ride home. After that, I picked Herlinda up after she got off work about three different times. Every time that I picked her up, Mateo Guerra, a boy that worked with me at the bowling alleys was along. This was about one week before she was killed. After the last time that I gave her a ride home, I did'nt see Herlinda until the night that she was killed.

On the night that Herlinda was killed which was Saturday, June 18, 1955, I saw Herlinda at the Los Angeles Night Club on Nogalitos St., at around 9:00 P. M. I had been there for about one hour with a friend, Rudy Farias, when I saw Herlinda come in. She greeted several people in the place and then she sat at a table with a lady. I had danced with several other girls and I danced a piece with Herlinda. Rudy and I left around 9:30 P. M., and when we did, Herlinda was sitting with the lady at a table.

After we left the Los Angeles Night Club, Rudy and I went to the New Yorker Night Club on Nogalitz St. We stayed there for a short while and then we went to the Old Mexico Inn and Johnny's Paradise. After we left Johnny's Paradise, we went to a little restaurant that's located at the corner of Humble and Somerset Rd. It was shortly after midnight when we got to the restaurant. We ate and it was around 1:00 A.M., when we left to go home.

I was taking Rudy home and, when we got to the corner of S. Z rzamora and Huble Sts., I saw Herlinda walking alone. I stopped and offered her a ride home. She accepted and got in the front seat between me and Rudy. I drove straight to Rudy's house and I dropped him off. Then I went to drop Herlinda off. I stopped in front of her house, and as I did so, my car motor died. My car would get overheated and it would do this very often. It was around 1:30 A. M., when I stopped in front of Herlinda's house. We were there just a moment. When

I saw that the car had died, I turned the car lights out to start it again. As I was to start the motor, Herlinda started to tell me something so I didn't start the motor. She was telling me to tell my sister to pick her up the following morning so that they could go to church together. As she was talking to me, she opened the car door to get out, she had one foot out of the car. She had not finished talking to me when I noticed that she stopped talking all of a sudden and she kept looking toward the back of the dar. I turned around to see what she was looking at, and when I did so, I saw a man walking toward my car. He was about ten feet from my car. The man was a very short man but I could not see his face because of the street [fol. 208] light being behind him. As I turned around, Herlinda said, "Here comes Alvaro and there's going to be trouble. Drive away from here." I started the motor and as the car started to move, the man jumped in the car. The front door had been open as Herlinda had been ready to get off. The man got on top of Herlinda and he started hitting at her, that is, I thought that he was hitting her until Herlinda screamed, "Nato, he's stabbing me with a knife." All the time that the man was stabbing Herlinda, my car was moving. I was yelling at the man to leave her alone but he just kept stabbing at her. He stabbed her many time. I noticed blood splattering on me. By this time, we were about one block from where the man had jumped in the car. I don't recall whether I stopped the car or whether it stopped by itself, but the car came to a stop about one block from where the man got on. When the car stopped, I braced myself against my door and I started kicking at the man to get him off Herlinda but I couldn't do it. I then got out and picked up some rocks and came around to the other side of the car. As I came around the car, I saw the man waiting for me. I threw a big rock at him and missed him because he ducked back in the car and the rock hit the side vent of the door. I then went back around the car to pick up some more rocks. I came back again and he was again waiting for me. I threw the second rock at him and he ducked and the rock missed him. Then he came at me and said, "Te voy a matar, hijo de la chingada," which in English means, "I'm going to kill you, you son-of-bitch." When he came at me, I ran away from him. I ran between

a house and a vacant lot. I ran for a little distance and then I looked back. He was not chasing me any more. I started circling through the vacant lot to come out in front of the car and I heard him starting the motor. As I came out on the street, the car was moving. The man was in back of the steering wheel.

The car kept going west on Brunswick and I ran in the same direction. I ran to my sister Delfina's house and woke her up. I asked her to give me the keys to her car and she asked me what was the matter. I told her never mind what had happened and to give me the keys fast. I wanted to go catch up with the man that had taken my car. As I was waiting for my sister to give me the keys, I saw my sister's next door nighbor, Victor Lucio coming home. I yelled at him to wait and I told him what had happened. I got in Lucio's car and we went all around looking for my car. We went on Zarzamora, Somerset Rd., Palo Alto Rd., and all the brushy part around there but we never found my car. We even went by the Robert B. Green Hospital and the Santa Rosa Hospital to see if my car was around there, thinking that maybe the man had taken Herlina to the hospital, but we didn't see my car. We drove around until after 4:00 A. M., and then Lucio wanted to go home. He let me out in front of his house and I walked to my house. I started looking for my car papers because I wanted to report it stolen to the police. It was around 5:00 A. M., when I found the car papers. After I found the car papers, I went to my sisters house. She was asleep, so I waited until she woke up. She got up around 6:00 A. M., and I told her what had happened. She wouldn't believe that the man had stabbed Herlinda. I just could not convince her. I showed her where the blood had splattered on my clothes. Then she decided to go tell Herlinda's people about it. She got dressed and went and told Herlinda's people what had happened and, when she returned we called the police. By then it was around 8:00 A. M. [fol. 209] After we called the police, Officer Rosas came to my sister's house and we told him what had happened. Herlinda's father and mother were there by then.

I didn't hear any more about it until the next day, Monday, when I was asked to come to the Sheriff's Office to give a statement. Then on the following day I read in

the paper where they had found my car somewhere in the country. Up until now, I have not seen my car.

Although I knew that Herlinda's husband's name was Alvaro, I didn't know him. One time I saw him with Herlinda but I saw him from behind. On the night that Herlinda was stabbed, I knew that it was her husband that was stabbing her because before he got in the car she said that it was Alvaro and it was a man of the same size as the man I had seen with her and knew to be her husband. I don't know whether I'll be able to identify the man that stabbed Herlinda. If I can identify him, it will be only by his build, because I never saw his face.

One thing I want to add. When the man first walked to the car, that is when he ran to get in the car, he cursed Herlinda. He said, "Hija de la chingada, ya te pesque," which in English means, "You Bitch, I caught you."

Several days after the stabbing, I went to the San Jose Funeral Home and I viewed Herlinda's body. She was dead. The same girl that I saw dead at the San Jose Funeral Home was the same Herlinda that had been with me and got stabbed in my car.

I have given the above statement freely and voluntarily to Pete N. Torres. I have read it and it is true and correct to the best of my knowledge and belief.

Witness ——— —

Sworn to and subscribed before me this day of , 19 , A. D.

———, ———,
Notary Public in and for Bexar County, Texas.
(Seal)

Duplicate copy of Statement of Facts in Cause Number S-54370, styled The State of Texas vs. Alvaro Alcorta, in the Criminal District Court No. 2, of Bexar County, Texas, was introduced in evidence by agreement of parties in view of the fact the original Statement of Facts in Cause No. S-54370 was on file in the Court of Criminal Appeals, to which reference is here made.

[fols. 1-77]

IN THE CRIMINAL DISTRICT COURT No. 2 OF BEXAR COUNTY, TEXAS, SEPTEMBER TERM, A. D. 1955

No. S-54370

THE STATE OF TEXAS

vs.

ALVARO ALCORTA

Statement of Facts

Be it remembered that heretofore, to-wit, on the 3rd day of October, A. D. 1955, came on for trial the above entitled and numbered cause, before the Honorable Joe. Frazier Brown, Judge, Criminal District Court No. 2, Bexar County, Texas, and a jury.

APPEARANCES

Roy Barrera, Esq., Hubert W. Green, Jr., Esq., on behalf of the State of Texas;

E. P. Lipscomb, Esq., on behalf of the Defendant;

[fol. 78] (Witness excused.)

Mr. Barrera: The State calls Esperanza Huron.

ESPERANZA HURON, called as a witness by the State of Texas, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Barrera:

The Court: Your name is Esperanza Huron?

A. Yes, sir.

Q. The Court: You will have to speak loud enough so that all the members of the jury can hear you and so that both sides can hear you and so I can hear you.

A. Yes, sir.

The Court: When you answer the question, speak out in answer to each question and don't answer any question by nodding your head.

A. All right.
Q. Your name is Esperanza Huron, is that correct?
A. That's right.
Q. Esperanza, how old are you?
A. I'm 23.
Q. Are you married?
A. No; I'm divorced.
Q. Divorced. Where do you work, Esperanza?
A. Hernando's Bar.
Q. Hernando's Bar?
[fol. 79] A. Yes.
Q. What street is that on?
A. South Concho.
Q. How long have you worked there?
A. About six or seven months.
Q. Six or seven months?
A. Yes.
Q. Were you working at Hernando's Bar on or about June 18 of 1955?
A. I was working at the Cinco de Mayo Bar.
Q. And where is that located?
A. Right next to Manny's.
Q. With reference to Hernando's Bar, is it next door?
A. About three doors before going to Hernando's Bar.
Q. What street is it on?
A. South Concho.
Q. Now, on that afternoon or on that day, did you have occasion to go from the Cinco de Mayo Bar over to Manny's Bar?
A. That's right.
Q. Do you know the defendant now on trial, Alvaro Alcorta?
A. Yes, sir, I do.
Q. Did you have occasion to see Alvaro Alcorta there in Manny's Bar on Concho Street that afternoon?
A. Yes.
Q. Was he alone or with someone?
[fol. 80] A. He was accompanied by a woman.
Q. Do you know the name of that woman?

A. Yes, sir.
Q. What is her name?
A. Dominga.
Q. Dominga?
A. Yes.
Q. Do you know her last name?
A. No, I don't.
Q. I see. Now, did you have occasion to talk to Alvaro Alcorta or Dominga in the presence of this defendant here that same afternoon?
A. Yes, I did.
Q. Can you tell us what took place there, what the conversation was about?
A. Well, they were talking about—I think they went up to that restaurant where his wife used to work; and, when I walked up to them, I heard Dominga say, "You had better not do nothing to her."
Q. "You had better not do nothing to her"?
A. To her; I don't know what they were talking about; but, then, he told me that they had been up to that restaurant and he had seen his wife and that he had taken her a necklace, which she didn't accept. So, he looked—he was upset and mad and, then, he told me I was going to read something about him in the papers. So, I said, "You are [fol. 81] crazy, leave he alone." And, well, he was mad, that's all.
Q. He was mad?
A. Yes.
Q. Now, after this conversation there, what did you do or where did you go?
A. I stayed there long enough to drink a beer and I went back next door.
Q. To the Cinco de Mayo Bar?
A. That's right.
Q. After having seen and talked to Alvaro there at Manny's Bar, did you see Alvaro again later on that same night?
A. Yes, I did.
Q. Where did you see him and at what time?
A. The Cinco de Mayo Bar about 6 or 6:30.
Q. How long was it from the time you left?
A. Well, it was more than an hour.
Q. More than an hour?

A. About an hour and a half.

Q. I see. Now, at that time you say you saw him, did you have a conversation with him or he with you?

A. No, not exactly a conversation; he just told me that I'd read about him in the paper Monday; and I told him he was crazy. That's all.

Q. And did you read about him in the paper Monday?

A. Yes, I did.

Q. How long have you known this defendant, Alvaro Alcorta?

A. About eight or nine months.

[fol. 82] Q. Had you ever seen him there at the Cinco de Mayor Bar or at Manny's Bar or at any of those bars there before?

A. No, sir.

Q. Where had you seen Alvaro, if you had?

A. I met him at Manny's Bar.

Q. You met him at Manny's Bar?

A. That's right.

Q. Had you ever seen him at Manny's Bar before?

A. No, sir.

Q. You say when you first met him, you met him at Manny's Bar?

A. Manny's Bar.

Q. Is that correct?

A. That's right.

Q. Then did you ever see him again before that night when this conversation took place?

A. Yes, I did.

Q. Where did you see him?

A. At the same place, Manny's Bar.

Q. How often would you see him there, if you did?

A. Well, he'd come down every two weeks.

Q. Every two weeks?

A. That's right.

Q. Would he drink there at Manny's Bar?

A. That's right.

Q. Now, did you ever have a conversation, sometime before this, the last time that you saw Alvaro there and he said these things, did you ever have a conversation with [fol. 83] him before about his wife and his troubles?

A. Yes.

Q. What was that conversation about?

A. Well, he told me that he used to go up to see his children up there and he'd never find his wife there at home.

Q. I see.

A. And that one of these days he was going to give it to her.

Q. "One of these days he was going to give it to her"?

A. Yes.

Q. Did he say that in Spanish or in English, Mrs. Huron?

A. Spanish.

Q. What did he say in Spanish?

A. "Le Voy a Dar en la Madre."

Q. "Le Voy a Dar en la Madre"?

A. That's right.

Q. Now, had you ever seen Alvaro Alcorta take drink to the point of getting drunk? Had you ever seen him drunk?

A. Yes, I had.

Q. Was Alvaro Alcorta drunk on this day when you had this conversation that he told you, "You are going to read about me in the papers Monday"?

A. No, he wasn't.

Q. Was he sober or drunk?

A. He was sober.

Mr. Barrera: I believe that's all. Your witness.

[fol. 84] Cross-examination.

Questions by Mr. Lipscomb:

Q. On this occasion, when he talked to you, you say he was sober. Had you had a few beers yourself?

A. No, sir; I had about two.

Q. About two beers?

A. That's right.

Q. You had that before he talked to you? You don't know whether he had two or three beers or not, do you?

A. No, I had them with him, the two beers.

Q. He drank two beers with you?

A. That's all.

Q. Did you drink with anybody else before he came in?

A. No, sir.

Q. How many beers did you have after he left?
A. Well, I couldn't exactly say.
Q. You could keep a count?
A. (Negative response by shaking head.)
Q. You say you are 23?
A. Yes.
Q. How long have you worked as a hostess—is that your title?
A. Since 1950, '51.
Q. You worked as that four or five years?
A. That's right.
Q. Right in that neighborhoood?
A. No, not exactly.
[fol. 85] Q. Over the different parts of the city or where?
A. I have been out of town and I have been here, but I have done the same think.
Q. When you worked out of town at a beer joint, where was that?

Mr. Barrera: Of course, if the Court please, we will object to that; there is no testimony that she worked out of town in a beer joint.
The Court: That will be sustained.

Q. (Mr. Lipscomb continuing:) I'll ask you, where did you work when you were out of town?
A. Well, I've been to several out of town places.
Q. Have you ever done any kind of work except at a beer joint?
A. Yes, I have.
Q. What kind of work was it?
A. I used to work in Chicago for the Life & Time Magazine.
Q. For what?
A. Life & Time Magazine.
Q. What kind of work did you do?
A. I was a machine operator.
Q. Machine operator?
A. That's right.
Q. Typing machine?
A. No, I don't know what they called it.
Q. How long did you do that work?
A. Oh, pretty close to six months.

Q. How long ago was that?
[fol. 86] A. About two years ago.
Q. Three?
A. Two.
Q. Two years ago?
A. Yes.
Q. And, since then, you've just worked in beer joints?
A. That's right.

Mr. Lipscomb: That's all.

Redirect examination.

Questions by Mr. Barrera:

Q. Mrs. Huron, do you have any children?
A. Yes, I have.
Q. Do you support those children?
A. I support two of them.
Q. Do you have to work for a living?
A. Yes.

Mr. Barrera: I believe that's all.
Mr. Lipscomb: That's all.
The Court: Do you have any further questions? Does either side want this witness any further?
Mr. Barrera: We'd like to hold her just in case.
The Court: Wait outside.

(Witness excused.)

Mr. Barrera: The State will call Dominga Soto.

[fol. 87] Domingo Soto, called as a witness by the State of Texas, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Barrera:

Q. Mrs. Soto, do you speak English?
A. (Negative response by shaking head.)
The Court: Would you interpret for her, Mr. Vasquez?

(Thereupon, through the Official Spanish-English Interpreter, the witness testified as follows:)

Q. What is your name?
A. Dominga Soto.
How old are you Dominga?
A. 19.
Q. Are you married?
A. Separated.
Q. Do you have any children?
A. Four.
Q. Are you supporting those children?
A. Yes.
Q. Do you have to work for a living?
A. Yes.
Q. What sort of work do you do?
A. I work in the bar waiting on the tables.
Q. Work in a bar waiting on tables?
A. Yes.
[fol. 88] Q. Where do you work at?
A. Flamingo.
Q. Flamingo?
A. Yes.
Q. Now, Dominga, with reference to Saturday afternoon, June 18, 1955, where were you working at that time?
A. Manny's.
Q. Manny's Bar?
A. Manny's Bar, yes.
Q. Is that there on Concho?
A. Yes.
Q. Dominga, do you know the defendant in this case, Alvaro Alcorta?
A. By sight.
Q. By sight. Dominga, did you have occasion to go anywhere with Alvaro Alcorta on that Saturday afternoon?
A. Yes.
Q. Where did you go?
A. We went to Gonzales' Place, I don't know—Gonzales' Cafe.
Q. You don't remember the name of the street?
A. No.
Q. Had you ever been there before?
A. No.

Q. How did you get there?
A. In a taxi.
Q. Why did you go there?
[fol. 89] A. Because that boy invite me and he was going to pay my time.
Q. He was going to pay for your time and he invited you?
A. Yes.
Q. Now, when you arrived there, Dominga, at Gonzales' Cafe, what happened?
A. We sat down on the counter, close to the counter.
Q. And, then, what happened?
A. Then the girl came up and served the table on us.
Q. A girl came up and served you and Alvaro?
A. Yes.
Q. Now, did Alvaro and that girl have any conversation?
A. No.
Q. Did you hear any conversation there between these people or with yourself?
A. No.
Q. What happened there when the girl waited on you and Alvaro at the table, Dominga?
A. She was crying.
Q. Why was she crying, if you know?
A. Because she saw me with him.
Q. Did she say anything about it?
A. No.
Q. Can you tell us whether or not Alvaro offered her anything?
A. Yes.
Q. What did he offer her, if you know?
A. A necklace.
[fol. 90] Q. Did she accept it?
A. No.
Q. Did she refuse it?
A. She threw it back to him.
Q. Did she say anything at that time?
A. Yes, to give it to somebody else.
Q. I see. Is that when she began to cry?
A. Yes.
Q. Did you then ask or have a conversation with Alvaro?
A. No.

Q. State whether or not you asked Alvaro who the woman was.

A. Yes.

Q. What did he say?

A. That it was his sweetheart.

Q. Did Herlinda say anything about that?

A. Yes.

Q. What did she say?

A. When I got up, she said, "He's my husband and we have three children."

Q. I see. Then what did you do, if anything?

A. I told her to pardon me, that I didn't know him.

Q. After that, did you stay there or did you leave?

A. I left.

Q. Did Alvaro stay there or did he also leave?

A. He stay there; I got up and went outside of the door.

Q. All right. Now, after you were outside of the door, [fol. 91] did Alvaro then come outside too?

A. Yes, he was coming behind me.

Q. I see. Now, how did you get back to the—or how did you leave from that place there? Where did you go after you got out of the door, where did you then go?

A. To the garage.

Q. Where is that garage?

A. In the same street, right close by.

Q. What did you do there?

A. We hire a taxi.

Q. I see. Now at the time that you were there at the garage waiting for the taxi, did Alvaro tell you anything?

A. Yes.

Q. What did he say?

A. That if he find her with another man he was going to get even with her.

Q. Did he say—state whether or not he said he was going to watch her.

A. Yes, he told me that.

Q. Did you say anything to him then at that time?

A. Yes.

Q. What did you tell him?

A. That if she didn't care for him to leave her alone.

Q. What did he say, if anything?

A. But he says, "She won't make a fool out of me; I am going to get even with her."

[fol. 92] Q. Now, at or about that time, Dominga, did he mention anything about Mexico?

A. No.

Q. After the taxi came, where did you go to?

A. Back to Manny's.

Q. Back to Manny's. On the way to Manny's did he say anything about Mexico?

A. Yes.

Q. What did he say?

A. That he was going to watch her and if he would find her with another man he was going to kill her.

Q. What did he say about Mexico, if he said anything?

A. That he was going to leave the work and go to Mexico.

Q. Go to Mexico?

A. Yes.

Q. Now, when you got back to Manny's Bar, did both of you go in?

A. Yes.

Q. While you were there at Manny's Bar, did anyone join you?

A. Yes.

Q. Who?

A. Two persons.

Q. Can you name them?

A. Esperanza and——

Q. Is that Eperanza Huron that just testified here?

A. Yes, sir.

Q. And did Alvaro say anything more about his wife and his trouble?

[fol. 93] A. That he had quit working and he was decided to do what he had decided to do.

Q. I see. That he had decided to do what he had decided to do?

A. Yes.

Q. After that, Dominga, where did you go?

A. I left and Esperanza stayed there with him.

Mr. Barrera: I believe that's all. Your witness.

Cross-examination.

Questions by Mr. Lipscomb:

Q. How long have you worked as a beer joint hostess?
A. Nine months right now.
Q. What did you do before that?
A. I was working at Manny's and now I work at Flamingo's.
Q. What kind of work did you do at those places, those establishments?
A. Just wait on the tables and dance.
Q. Did they have beer there where you waited on the tables and danced?
A. Yes.
Q. And you still do that kind of work except dancing, or do you dance now?
A. Just dance.
Q. You dance now?
A. Yes.

Mr. Lipscomb: That's all.

[fol. 94] Natividad Castilleja, called as a witness by the State of Texas, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Barrera:

Q. Natividad, I want you to face the jury a little over here and I want you to talk loud enough so they can all hear you.
A. All right.
Q. What is your name?
A. Natividad Castilleja.
The Court: You will have to speak louder than that.
A. Natividad Castilleja.
Q. How old are you, Natividad?
A. 19.
Q. Are you married or single?
A. Single.
[fol. 95] Q. Where do you live?

A. 1721 Brunswick.
Q. 1721 Brunswick?
A. Yes, sir.
Q. What sort of work do you do, Natividad?
A. Well—what you call it?
Q. Do you understand my question?
A. Yes, I understand your question but I can't remember that.
Q. You can't describe it? Do you know the name of it in Spanish?
A. Yes, but I can't remember.
Q. What sort of work do you do?
A. Furniture work.
Q. Furniture work. Is that furniture finishing or repair?
A. Finishing, yes.
Q. Who do you work for?
A. San Antonio Furniture.
Q. San Antonio Furniture?
A. Yes, sir.
Q. How long have you worked for the San Antonio Furniture?
A. About two years.
Q. Two years. Now, Natividad, have you ever had any extra jobs in addition to your work at the San Antonio Furniture Company?
A. Well, I was working at a part-time job at Woodlawn Bowling Alley.
Q. Woodlawn Bowling Alley?
A. Yes.
Q. Was that at the same time that you were working [fol. 96] for the San Antonio Furniture Company?
A. That's right.
Q. What hours would you work at the Woodlawn Bowling Alley?
A. From 7 to 11:30.
Q. Was that after the furniture store closed?
A. Yes; the furniture store closed at 4:30.
Q. I see. Natividad, who do you live with?
A. My grandmother.
Q. Did you know Herlinda Alcorta during her lifetime?
A. Yes, sir.
The Court: Speak out in answer each time; the jury can't hear your answer.

A. Yes.
Q. Where did you meet Herlinda Alcorta?
A. The first time?
Q. Yes.
A. At my sister's house.
Q. And where does your sister live?
A. On Harlan, 1447 Harlan.
Q. Harlan?
A. That's right.
Q. How far is Harlan Street, or your sister's house at 1447 Harlan Street from Herlinda Alcorta's address at the time of your address?
A. On, about one block or two blocks maybe.
Q. How far is Harlan Street then from Brunswick?
[fol. 97] A. Just one street to the south, sir.
Q. One street south?
A. Yes.
Q. Do they run the same way?
A. Yes, sir.
Q. So, then, how long had you known Herlinda Alcorta at the time of her death?
A. Oh, about a month and a half or two.
Q. A month and a half or two?
A. Yes.
Q. Now, what is your sister's name?
A. Delfina Cabrera.
Q. Is she married or single?
A. She's married.
Q. She's married. Now, other than the time that you saw or met Herlinda Alcorta at your sister's house, did you ever see her on other occasions?
A. Well, I give her about two times, I give her a ride.
Q. You gave her a ride about two times?
A. Yes, sir.
Q. From where to where?
A. From where she was working to her house.
Q. And where was she working?
A. Gonzales' Cafe.
Q. Where is that at?
A. Commerce Street.
[fol. 98] Q. On Commerce Street?
A. Yes.

Q. Now, at what time of the day or night would you pick her up when you would give her this ride home?

A. 12 o'clock.

Q. At night?

A. Yes.

Q. Where is this Woodlawn Bowling Alley?

A. It's on Fredericksburg Road.

Q. Fredericksburg Road?

A. Yes.

Q. Now, if you were going home from the Woodlawn Bowling Alley to your house, would it be out of the way to go by the Gonzales' Cafe on your way home?

A. Well, about two blocks.

Q. About two blocks out of your way?

A. Yes.

Q. Now, did Herlinda know you were working at this bowling alley?

A. Yes.

Q. How did it come about that you gave her the first ride?

A. Well, we were at my sister's house and we had a conversation; she came once and I was using the telephone there.

Q. Speak a little louder.

A. She came to my sister's house; I was there. So, we had a conversation there, me and my sister. And I told her where she was working and she told me where I was working too; so, I told her I was working at the Woodlawn Bowling Alley. So, she said if I would give her a ride, that [fol. 99] she would come out too late, you know, it was kind of dark.

Q. That she would come out too late?

A. Yes.

Q. Too late for what, did she say?

A. From work.

Q. She would come out too late from work and if you would give her a ride home?

A. Yes.

Q. All right. Now, Natividad, if you know and remember, when was the last time that you gave her a ride home before the day in which she was killed?

A. Oh, about ten days.

Q. About ten days?

A. Yes.

Q. Natividad, at these times that you picked her up, were you by yourself or was someone with you?

A. A friend of mine was with me.

Q. What is his name?

A. Mateo Guerra.

Q. Where would you pick him up?

A. He was working where I was working at the Woodlawn Bowling Alley.

Q. And where would you take him?

A. About two or three blocks from Brunswick Street south, sir.

Q. The other side of Brunswick, and is that the other [fol. 100] side of Harlan Street too?

A. Yes.

Q. Now, Natividad, did you give Herlinda Alcorta a ride home by yourself?

A. No.

Q. Natividad, let me ask you this question. Did you have occasion to go to the Los Angeles Night Club on Nogalitos Street on the night of June 18, 1955?

A. You mean if I went there that night?

Q. Yes.

A. Yes, I went there.

Q. About what time did you get there?

A. Around 8 o'clock.

Q. About 8 o'clock?

A. Yes.

Q. Now, were you alone or was someone with you?

A. A friend of mine, Rudy Farias.

Q. Rudy Farias?

A. Yes.

Q. Is Rudy outside here?

A. Yes.

Q. Now, where did you meet Rudy before going to the Los Angeles Night Club?

A. He came home to my house.

Q. He came to your house?

A. Yes.

[fol. 101] Q. About what time was that?

A. Oh, about 7:30.

Q. 7:30?

A. Yes.

Q. So, you got to the Los Angeles Night Club at about——

A. 8 o'clock.

Q. —8 o'clock?

A. Yes.

Q. Do you know who owns that place?

A. Well, Castano is his last name.

Q. Did you have occasion to see Herlinda Alcorta there——

A. No.

Q. —at that time?

A. No.

Q. Did you see her later on during the night?

A. Yes.

Q. About what time did you see her?

A. She came up about 9 o'clock.

Q. Did you see her come in the door?

A. Yes.

Q. Was she alone or with someone?

A. She was alone.

Q. Now, when she walked in the door, where did she sit, if she did?

A. She sat with a lady; I don't know who the lady was.

Q. With a lady?

A. Yes.

[fol. 102] Q. Did she sit with you?

A. No.

Q. Who were you sitting with, Natividad?

A. Rudy.

Q. Rudy Farias?

A. Yes.

Q. Now, you say that was at about 9 o'clock?

A. Yes.

Q. Now, during the night, did you dance with Herlinda?

A. Well, I dance about two times.

Q. About two times. Did you dance with anybody else?

A. Yes, some other girls.

Q. Did Herlinda dance with anybody else?

A. Yes, sir, she did.

Q. Now, what time did you leave the Los Angeles Night Club?

A. Oh, about 9:20.
Q. About 9:20. Who did you leave with?
A. Rudy.
Q. Rudy Farias?
A. Yes.
Q. Did Herlinda leave with you?
A. No.
Q. Did she stay there?
A. Yes.
Q. Now, when you left the Los Angeles Night Club at about 9:20, where did you go?
[fol. 103] A. New Yorker's Lounge.
Q. New Yorker's Lounge?
A. That's right.
Q. And was Rudy still with you?
A. Yes.
Q. What did you do at the New Yorker's Lounge?
A. We were watching them; we didn't went in.
Q. You were watching, but you did not go in?
A. Yes.
Q. Now, from the New Yorker's Night Club, did you go anywhere else?
A. Yes.
Q. Where?
A. We went to the Old Mexico Inn Night Club.
Q. Where is that?
A. On Nogalitos.
Q. How far is that from the Los Angeles Night Club?
A. About one block or two.
Q. About one block. And from the Old Mexico Inn where did you go?
A. To Johnny's Paradise.
Q. Johnny's Paradise?
A. Night Club.
Q. Was Rudy Farias still with you?
A. Yes.
Q. How long did you stay at Johnny's Paradise?
A. Oh, about an hour, I guess; it was about 12:10 or 12:20, somewhere along in there.
[fol. 104] Q. Somewhere along in there. Now, how far is Johnny's Paradise from the Los Angeles Night Club?
A. Oh, I don't know.

Q. About how many blocks?
A. Ten or twelve; I don't know.
Q. About ten or twelve?

The Court: Can the jury hear this witness?

(Assent indicated.)

The Court: Speak a little louder.

Q. (Mr. Barrera continuing:) Now, after you left Johnny's Paradise, where did you go?
A. To a little restaurant on Somerset and Humble Street, LaVillita.
Q. LaVillita?
A. Yes.
Q. Do you know who owns that restaurant?
A. I know him but I don't know his name.
Q. Had you ever been there before?
A. Yes, all the time.
Q. Is that a beer joint or is that a restaurant?
A. No, just a restaurant.
Q. Does anybody help him there at this restaurant?
A. Well, his wife and a little kid.
Q. A little kid?
A. A little boy.
Q. Now, was Rudy Farias still with you at this restaurant?
A. Yes, sir.
[fol. 105] Q. Now, how long did you stay at the restaurant and what did you do there?
A. We ate some hamburgers and we got out of there around 1 o'clock.
Q. Around 1 o'clock?
A. Yes.
Q. Who waited on you when you were there?
A. That little body, the son.
Q. I see. How do you know that it was about 1 o'clock, Natividad? How do you establish the time?
A. Because, when we got to Zarzamora Street, it was over, everybody was coming out.
Q. Out of where?
A. Out of Madrino's Night Club.
Q. Out of Madrino's Night Club?

A. Yes.

Q. That was a Saturday night, you say?

A. Yes.

Q. All right. When you passed by Madrino's, where did you go from there?

A. Well, she was walking down the street and I told her if she wanted a ride.

Q. Who was walking there?

A. Herlinda.

Q. And just where did you pick Herlinda up?

A. On Zarzamora and Humble.

Q. Zarzamora and Humble?

[fol. 106] A. Yes.

Q. And the restaurant that you were at was on Humble and Somerset?

A. Humble and Somerset.

Q. And you picked Herlinda up on Humble and Zarzamora?

A. Yes.

Q. Now, was Herlinda alone or with someone?

A. She was alone.

Q. You asked her if she wanted a ride home?

A. Yes.

Q. And did she accept a ride?

A. Yes.

Q. Did she get into the car?

A. Yes.

Q. All right. From there, where did you go?

A. We went straight east and, then, I turn on Lennon and I took Rudy home. On my way back, I stopped at Herlinda's house.

Q. Now, with respect to your house, who lived closer to your house, Herlinda—

A. Herlinda.

Q. —or Farias?

A. Herlinda.

Q. So, if you were going to take—

A. What?

Q. If you were going to take Farias home, then Herlinda —

A. Would be closer.

Q. —would be the last party you let off?

[fol. 107] A. Yes.

Q. And that would be how many blocks from your house when you let her off?

A. About two blocks.

Q. About two blocks?

A. Yes.

Q. So, then, did you leave Rudy home?

A. Yes.

Q. And, then, from there where did you go?

A. To the front of her house and stopped there.

Q. To the front of her house?

A. Yes.

Q. About what time, Natividad, would you say it was by this time?

A. Oh, about 1:15 or about 1:20, something like that.

Q. About 1:15 or 1:20?

A. Yes, about that.

Q. Do you know the address of Herlinda there on Brunswick?

A. No.

Q. Is it on Brunswick Street?

A. Yes.

Q. Is that anywhere close to the grocery store of Jimmy Flores?

A. Yes.

Q. Is that grocery store located on the corner there?

A. Yes.

Q. Do you know the name of that street that crosses there?

A. With Brunswick?

[fol. 108] Q. Yes.

A. And Lennon.

Q. Where?

A. Lennon; that's the street that crosses it.

Q. What's the name of that street?

A. Lennon; I don't know how to spell it.

Q. Well, is that intersection located here in Bexar County, Texas?

A. Yes.

Q. All right. So, you say that you arrived there at Herlinda's house. Now, with reference to the wront of Herlinda's house, where did you stop?

A. Well, in front of the house.

Q. Right in front of her house?

A. Yes.

Q. All right. Did you and Herlinda have any conversation there?

A. Well, when I stopped, the motor stopped; so, I had to put the lights out so I could start it again.

Q. Was there something wrong with your car?

A. Yes, it would stop once in awhile and I had a little trouble; the carburetor or something like that, I had a little trouble with it.

Q. So, then, your car stopped and you put the lights out to start it again?

A. Yes.

Q. All right. Did you have a conversation with Herlinda?

A. Yes; she opened the door. She was going to get off [fol. 109] and, then, she told me to tell my sister to come and pick her up in the morning so she could go to church.

Q. To tell your sister, Delfina Cabrera, to come pick her up in the morning so she could go to church?

A. Yes.

Q. At that time, did anything happen?

A. At that time, she came back and she was looking back to, you know, where Jimmy Flores store is.

Q. Yes.

A. So, I said, "What is it?" And I turned back and, then, somebody was coming.

Q. Somebody was coming?

A. Yes.

Q. Did you see that somebody coming?

A. Yes, it was a short fellow.

Q. A short fellow?

A. I couldn't see his face.

Q. All right. Speak up louder, Natividad. Then what happened?

A. Well, then, she started looking—

The Court: Speak louder.

Q. Speak louder, Natividad; you'll have to let the gentleman way back there hear you. Speak louder.

A. So, then, she said, "It's Alvaro; get out of here, drive away." So, I started the car and just started going

and he ran up to the door and grabbed the door and got in.

Q. Did she say anything about trouble at that time?

[fol. 110] A. Yes, she said there was going to be trouble. So, I started going and this guy was hitting her; so, —.

Q. Wait a minute. Now, you say this guy was hitting her. Was she in the car?

A. Yes, she was in the car.

Q. Well, how did the fellow get in the car?

A. He jump in.

Q. He jumped into the car?

A. Yes.

Q. Was the door still opened?

A. Yes, it was still open; she was going to get off.

Q. On whose side of the car did he get on?

A. On the passenger side.

Q. On Herlinda's side?

A. Yes.

Q. You were still behind the steering wheel?

A. Yes.

Q. You say you started the car, and where did you go?

A. Straight on, zig-zag; I move the car to see if he would fall off and he wouldn't fall off.

Q. You zig-zagged the car to see if he would fall off?

A. Yes.

Q. He didn't fall off?

A. No.

Q. Then what happened?

[fol. 111] A. I told him to stop; and I turned to see what he was doing and, then, when I looked back to the street, I was going toward a telephone post so I stopped and I opened the door. She had her head up about right here (indicating), and it was filled with blood.

Q. And splattered you with blood?

A. Yes.

Q. At the time that you say that Alvaro was hitting Herlinda, did she say anything?

A. Well, she was saying, "No, Alvaro, no", something like that.

Q. Did she say anything to you about a knife?

A. Yes, she said he was stabbing her with a knife.

Q. She said, "He is stabbing me with a knife"?

A. Yes; I opened the door and I grabbed him and I started kicking him.

Q. You started kicking him from your side of the door?

A. Yes.

Q. What were you doing, kicking over her?

A. Yes.

Q. Were you unable to kick him off?

A. I was hitting him, but I couldn't get him off.

Q. So, then, what did you do?

A. So, I picked up a rock and went around the car and this guy went out of the car and I threw him the rock.

Q. You threw the rock at him?

A. So, he dived into the car and I missed him.

[fol. 112] Q. What size rock was that?

A. About the size of a cantaloupe.

Q. About the size of a cantaloupe, a melon?

A. Yes.

Q. And, then, after you threw the rock, what did you say happened?

A. Well, then, he got after me.

Q. Did you hit him with the rock?

A. No, I didn't.

Q. Did you hit anything with the rock?

A. I hit the glass on the door, the little glass.

Q. The little glass. Is that the door vent?

A. Yes; then the rock fell on the ground.

Q. Now, before that, while Alvaro was still standing there, did she ever scream out or cry out at any time?

A. She screamed real loud.

Q. She screamed real loud?

A. Yes.

Q. That's when you were already by the telephone pole and you had stopped the second time, is that correct?

A. Yes.

Q. All right. Then you got out of the car, you came around and threw that rock at him and missed him?

A. Yes.

Q. Then what happened?

A. He went after me and he said, "I am going to kill you."

[fol. 113] Q. He went after you?

A. Yes.

Q. And said that he was going to kill you?

A. Yes.

Q. All right.

A. So, I didn't have nothing to use, I had to pick up something; I didn't have nothing to defend myself, so I had to run. So, he went after me and, then, he stopped and I heard the motor; he was starting the car. So, by the time I came back, he drove away.

Q. All right. Now, at the time that the car drove away, was the door on Herlinda's side closed or open?

A. It was open.

Q. It was open. Could you see any part of Herlinda's body?

A. Yes, the feets, the two feets, I guess.

Q. The feet?

A. Yes.

Q. Was that the last you saw of your automobile that night?

A. Yes.

Q. Which way was it headed when you last saw it?

A. He was going on Brunswick, going west.

Q. West toward what main street?

A. Zaragamora Street.

Q. Zarzamora?

A. Yes.

Q. All right. After you last saw your car there, Nativi-
[fol. 114] dad, what did you do?

A. Well, I ran to my house and I started knocking on my sister's house, you know, and told her to open the door.

Q. When you say "your house" and you talk about your sister's house, do you live there too?

A. No, I don't, I live across the street.

Q. Across the street from your sister's house?

A. Yes.

Q. So, did you go to your house or your sister's house?

A. To my sister's house.

Q. And you started knocking on the door?

A. Yes; she came out and I told her to give me the keys for her car. So, she gave me the keys and, then, when I was coming out to get on the car, a friend of mine was coming from the dance too, so I told him.

Q. A friend of yours was coming from where you say?

A. From the dance.
Q. I see. Was he walking or in a car?
A. No, he had a car.
Q. What is his name?
A. Victor Luciq.
Q. Is he outside here too?
A. Yes.
Q. All right. And, then, what happened with you and Victor?
A. Well, I told him to take me, that somebody took the car and stabbed Herlinda. So, he went and looked for it [fol. 115] over on Military Drive, Somerset and all of those dark streets all over there. I thought he was going to leave the car over there.
Q. Louder, Natividad.
A. I thought he was going to leave the car some place, you know, leave the car there. And we couldn' find it; so, Victor told me, "Maybe he took it to the hospital or something like that." So, he said, "Let's go over there." So we went to the Robert B. Green and Santa Rosa hospitals, so, by the time we came back, it was around about 5 o'clock.
Q. By the time you came back where?
A. From the hospital.
Q. Back to where though?
A. My house.
Q. To your house or your sister's house?
A. No, my house.
Q. Your house, all right. Then that was about 5 o'clock in the morning?
A. Yes.
Q. Then what did you do at your house?
A. I went to 'phone about it; I went for the papers of my car so I could report it; I didn't know my license number.
Q. Did you find your car papers?
A. It took me about an hour to find them; by that time, I went to my sister's house and she got up and I told her what happened and she went to call her mother, Herlinda's mother.
[fol. 116] Q. She knew Herlinda's mother?
A. Yes.
Q. Did she know Herlinda's family?
A. Yes.

Q. So, she went over there?

A. And she told them about it.

Q. Now, Natividad, did you or anyone in your presence call the police?

A. Well, I did.

Q. You called the police?

A. Yes.

Q. About what time?

A. I don't know; about 6:30 or 7. I don't know what the time was.

Q. You don't know the time?

A. No.

Q. All right. Now, did the police come out there?

A. Yes; Rosas something.

Q. Ignacio Rosas?

A. Yes.

Q. A man in uniform?

A. Yes.

Q. Now, Natividad, after that time, after you last saw your car with Herlinda in it, did you ever see Herlinda Mendoza Alcorta alive again?

A. No.

[fol. 117] Q. Did you ever have occasion to see your car again? Did you ever see your car again after that night?

A. Well, I went to the police parking lot and I saw it there.

Q. Did you see your car there?

A. Yes.

Q. Did you get up anywhere close to it?

A. No.

Q. You didn't examine it closely?

A. No.

Q. You know it was your car though?

A. Yes.

Q. Now, at the time that Alvaro first came up to the car, right after Herlinda said, "Here comes Alvaro, there's going to be trouble, drive away from here," when he first got up to the car, did Alvaro say anything to Herlinda?

A. He said something like, "I caught you," or something like that.

Q. "I caught you"?

A. Yes.

Q. Did you ever go to the San Jose Funeral Home?

A. Yes, I went.

Q. Did you see the body of Herlinda Alcorta there?

A. Yes.

Q. Is that the same girl you saw there that was with you that night?

A. Yes.

Q. Natividad, were you in love with Herlinda?

A. No.

[fol. 118] Q. Was she in love with you?

A. No.

Q. Had you ever talked about love?

A. No.

Q. Had you ever had any dates with her other than to take her home?

A. No. Well, just when I brought her from there.

Q. Just when you brought her from work?

A. Yes.

Mr. Barrera: I believe that's all.

Cross-examination.

Questions by Mr. Lipscomb:

Q. You said something about throwing a rock. Didn't you throw several rocks?

A. Yes, about two times, sir.

Q. How many?

A. Two times, two rocks.

Q. Only two rocks?

A. Yes, sir.

Q. And, then, you ran away?

A. Yes, he went after me; yes.

Q. How is that?

A. When he went after me, I did.

Q. When he went after you, you ran away?

A. Yes.

[fols. 119-131] Q. And how long after that was it before you 'phoned the police?

A. Oh, it took about six hours, or five hours.

Q. Five hours?

A. Or six, something like that.

Q. Did the police come at once or were they slow in coming?

A. They were slow in coming; they come up about 7.
Q. When did you find your car?
A. When did I find it?
A. Yes.
A. I didn't find it; they had it over here in the parking lot, the police parking lot.
Q. Was that the next day?
A. Oh, about two or three days later.
Q. Two or three days later?
A. Yes.
Q. You never did see Herlinda with any other boy, anybody except you?
A. No, I didn't.

Mr. Limpscomb: I believe that's all.
Mr. Barrera: That's all.
The Court: You may step down and wait outside.

(Witness excused.)

The Court: Will you take the jury, Mr. Dominguez?

(Thereupon, the Court took a short recess, at the conclusion of which the following proceedings were had:)

[fol. 132] ALVARO ALCORTA, a witness in his own behalf, having been duly sworn, testified as follows:

Direct examination.

Questions by Mr. Lipscomb:

The Court: Speak out loud enough so that all the jurors can hear you and so that both sides can hear you, and so that I can hear you.

A. All right.
Q. What is your name?
A. Sir?
Q. What is your name?
A. Alvaro G. Alcorta.
Q. Alvaro Alcorta?
A. Yes.
Q. You are the defendant in this case?
A. I am.

Q. You have heard the testimony concerning you and your relations with your wife?

[fol. 133] A. Yes.

Q. Now just tell in your own words, so the jury can hear you, what happened on this occasion they have testified about.

A. Well, it happens this way. It is just like a man meets a girl and gets married and they live happy, yes, for awhile, you know, because I have three children; I love them. Every year my wife went to see her parents; I didn't have no objections whatsoever; I gave her money.

Q. Speak slowly so the jurors can hear you.

A. I gave her money to see her parents, every time they went away, and the job was to pick cotton up in the west; and, while she was over there, I didn't know what she was doing at all. Not only one year, year after year. I tried to be good to her and give her everything I could for her and my children. Then, one day came—I don't know or remember the date, I'm too disturbed anyway—but one day came that she asked me: "I want to go see my parents again." I told her, "All right, you can go and see your parents; I don't have no objections whatsoever." I never did. And I gave her money and she went and saw her parents up in the west. She was to stay two weeks. The two weeks came up and I didn't receive no letter whatsoever or anything like that, no; and, well, no money for transportation and I don't know what she was doing or anything like that.

[fol. 134] Q. Speak slowly and distinctly so they can all hear you.

A. So, I decided to go up and get her. One of the witnesses that was here, by the name of Antonio Martinez, he was the one that took me. He had bought a car and he asked me, "I ain't got no money to make the trip but we can share the costs," since his wife was my wife's sister. So, I told him, "I'll help you with whatever it costs, whatever it costs us in food and all and you'll put in the car." And he said, "All-right." We went up there and got my wife and her sister with my children. As soon as we got here in San Antonio the next day, I brought her home. She only stayed about 15 minutes at the most and, then, she said, "I'm going to leave you with the kids." We

didn't—we were not angry or anything like that. She just wanted to take off; that's all. So I said, "All right, I can't hold you; I can't force you."

The Court: Wait just a minute until that truck gets by. All right, now go ahead.

A. "I can't force you to stay here with me." She said, "Well, I just decided to go and that's all." I told her, "Well, if you leave me and the kids, it's all right but never come back, please." She said, "I never will." So, that day, the bus don't go up to the west until 1 o'clock at night and I wanted to make sure she was going to leave, just like that, no cause; we weren't angry, we didn't argue or nothing like that. She just wanted to leave. So, I said, "All right." So I took my smallest son, Johnny Alcorta, two [fol. 135] years old, up to the bus station and I s.. her there. I talked to her and I pleaded and I asked her to stay to look after the kids at least. She refused; she said, "I have already taken out the ticket because I am going to leave." There was nothing in the world I could do, just let her go; but I wanted to make sure that she was leaving. I don't want nobody to tell me, "Well, she just left with some other man," or nothing like that. I saw her with my own eyes, and my kid even waved to her "goodbye". So, now I had to return home with my kids and I had to find somebody to look after them so that I could go to work. I did. I had three sisters, who are married, and they were kind enough to look after my kids. One of them, the smallest one, was taking care of them; I was giving her $35.00 up to $60.00 every two weeks so that she could take care of my kids. During the six months, well, my kids were happy; well, every now and then they would ask, "Where's mother?" I tell them, "Well, oh, she'll be back some day." During those six months, why, it was so hard; I saw my kids, and my brother-in-law bought a television and they were kind, you know, and my sister was showing them, showing my kids the way of living, like praying and good manners and all of that like that. Although every now and then, I do not deny, I used to go out and, of course, sometimes I did get drunk and I thought about everything that was happening. Why was it that my [fol. 136] wife left me with my kids and just took off like

that? I didn't have no idea; nobody said anything to me. I couldn't get no information, of course, from her sister because her sister went with her when she went to the west to see her mother; but, of course, it was her sister. She wasn't going to tell me what they done over there, what they had been doing, if they all went out dancing, drinking and all that sort of stuff, if she went out with a fellow. So, one day, while I was working, I got an idea. There is a cousin of my wife's and I asked her a favor and if she would do it for me and she said "yes". I asked her husband, got the permission from her husband and he said, "Yes, she can go", just because she went away like that, even though they are in the same family and the same family because that cousin—I can't explain, but that's the cousin of my wife's sister; they were in good terms, but, with my wife, they were not in good terms. And she was mad and I told her, "All I want is to get the truth, why did she went away." I had to get this information somehow; and she said, "Yes, I'll do it for you." I gave her $5.00 to take a taxi on account of she had a small child and that day it was cold; I remember that. It was rainy and it was cold. I told her, "You take a taxi and go out there and start making conversation with my wife's sister and see what's the matter, what happened." So, she went, and, when I got out of work, since it was near there, I stop at [fol. 137] her place and I asked her, "What was it? What has happened?" My wife's sister had told her——

Mr. Barrera: Just a minute. Your Honor, at this time, I anticipate we are going into some hearsay testimony and we are going to object to it, as to what the wife's sister may have said, if she is not available as a witness and subject to cross-examination.

The Court: That will be sustained.

Q. (Mr. Lipscomb continuing:) On this occasion that they have testified about, the last night that you saw your wife, just what happened? When did you first look for your wife on that night?

A. On that night?

Q. Yes.

A. Well, like the testimony was here awhile ago, that they said that I was drinking with them and all that, why, yes, I was drinking with them. I know that Esperanza but

I don't know the other girl. I went over there to that restaurant to see my wife at that time and I went over there with this girl because we bought her a present and I wanted to take it to her to the restaurant where she was working; and, at the same time, I wanted to see her and I took the present over there to give it to her. She refuses; all right. The night before that I have seen her with another man in a car and he was—she was waiting outside of the restaurant there. This other woman too, the testimony was given, that was given here that she never saw my wife go- [fol. 138] ing out with another man at the same place. I saw that with my own eyes one day before that; and that's why I told her, "How about last night", when I was trying to give her the present and she refused. She didn't say nothing, she just started crying. Although I went with the other woman, I had no intentions of abusing or making her mad in no way; I just wanted to give her that present because I just felt that way. I just wanted to take her that present and see her. When she refuses, I went out; I went out of the place and I don't remember if we took a taxi back or what. Well, I was kind of mad; yes, I was mad. But, after that, I kept on drinking; that's when I went to that place, Cervantes', and I kept on drinking until, well, until he closed. After that, I asked him for six beers and I kept on drinking. I drink the six beers. Well, I drink the six beers, and I finish them. From there, I went to see my wife, but I didn't see my wife alone or in the house or getting in from work or anything like that. She was with another man in a car. Although he was here and saying it was the only time he have seen her, I have seen him several times in the Radio Club dancing and she was with that same fellow, and not only with that same fellow but with many others that I don't know the names of. That's when I saw her there in that place; and I didn't really have the intentions that, like Mr. Roy Barrera's got in the statement that I have decided to kill her right there. I didn't have [fol. 139] those intentions; I only went to the car and this guy started, well, getting mad and all of that. Well, I never did carry a knife either because I had turned my job in, and I was going away. I never did carry a knife myself, I mean in my pocket. I was going, when I turned my job in, to leave because I didn't want nothing to do with her at least.

Q. This knife that you had, was that longer than a three inch blade?

A. Well, I don't know; I couldn't hardly say.

Q. What did you use that knife for?

A. Well, it's got a leather puncher in it and two extra blades.

Q. You used it on your job?

A. No, sir, I never did carry a knife.

Q. How is that?

A. I never did carry that knife in my pocket.

Q. Where you worked at Kelly Field, did you use that knife?

A. No, sir, they don't let you carry any knife longer than two inches over there; they are pretty strict on that.

Q. Well, this knife that you had, did that have a two inch blade or a three inch blade or do you know?

A. I think it was about a two inch blade on it.

Q. And when you saw Castilleja in the automobile with your wife, what did he do?

A. Well, he start kicking me for one thing; and my wife was sitting down and they were kissing; I was looking at them from the rear, from the rear window.

[fol. 140] Q. Speak slowly so we can understand.

A. When I was getting to the car, when I turned the corner, I saw my wife was kissing with this fellow here; I didn't know him then. I just saw him dancing at the Radio Club up here. She had so many that I don't remember their names; I wouldn't be asking for that, I just saw her, that's all. And I saw them, they were kissing; and I thought they were having a date-up or something; she had the door open, yes. But I had a feeling that something else was going to happen then, not only that they were kissing and all of that but something else. If I had had a camera and waited a little longer, it would have been a different story than what they claim up here.

Q. Well, when Castilleja was in the car with your wife and you had a knife in your hand, did Castilleja start in your direction?

A. Yes, sir, he started kicking and, well, that was before. When I got to the car, he started the car; my wife said something to him that I heard like, "My husband is coming". She knew it; she didn't saw me or anything like that but she heard me while I was walking on the gravel.

I had those thick-soled shoes and, when I was walking in the gravel, she knew that it was me. I was getting near the car.

Q. What did Castilleja do when he saw you?

A. When he got in the car, why, I was getting near to the car and she was going to close the door and he started [fol. 141] the car; but I hold the door and jump on the running board. That's when the car started zig-zagging. Well, I was trying to get ahold of it myself and, at the same time, stab my wife. I stab her I don't know how many times, I was so mad.

Q. Did Castilleja start fighting with you?

A. After I stabbed her, yes.

Mr. Barrera: If it please the Court, we are going to object; he has asked leading question after leading question.

The Court: Don't lead your witness, counsel I will sustain the objection.

Mr. Lipscomb: I will try not to, your Honor.

Q. (Mr. Lipscomb continuing:) What happened when Castilleja started and you were getting in the car? Just state what happened.

A. He just took off and I jump on the running board.

Q. He jumped out?

A. No, he started the car and took off with me on the running board and my wife in between, between the seat.

Q. Where was he? You took off in the car or he did?

A. He was driving the car; I mean, when I was getting to the car, he started the car because my wife told him that I was coming, see.

Q. And what happened?

[fol. 142] A. They were planning to take off and just leave me there, but I jump on the running board.

Q. What happened then when you jumped in the car?

A. I had my knife in my hand and I start stabbing my wife.

Q. What did Castilleja do then?

A. Well, at that time I think he got scared or something and his car went—just went dead about half a block.

Q. Did he stand still or what did he do?

A. No, he jump out and start kicking me in the mouth and everywhere he could.

Q. He kicked you?

A. Kicked me, yes.

Q. You say he kicked you?

A. Sir?

Q. Did you say he kicked you?

A. Yes, he kicked me about, I don't know how many times.

Q. Then what did he do next?

A. He went around and picked up some rocks.

Q. How many rocks did he throw?

A. I didn't count them; there were a few, quite a few.

Q. How many?

A. There were quite a few, I don't know, 20 or 50, something like that.

Q. What did you or did he do after he threw the rocks?

A. Well, he was throwing them, and I believe it was kind of funny he never hit me. I am not trying to accuse of this [fol. 143] guy of trying to kill my wife or anything, but I know he hit her with a rock on her head. The rock was the size of a cantaloupe and she must have had some injury in her head. I'm not trying to accuse him or trying to do anything like that; I'm just trying to tell what is the truth.

Q. What happened next? Speak slowly so they can understand you, please.

A. Well, he threw that rock and my wife was standing—although she was stabbed already and all that, she was standing out of the car, trying to get out and she was lifting up like that (indicating); and that rock, I ducked from the rock and turned around and I saw that rock hit her and she fell forward and, then, she went back; that's why her legs were hanging out of the door when I took out in the car and the door was opened.

Q. Who threw the rock that hit her?

A. Castilleja.

Q. What did he do then?

A. Well, I ran after Castilleja and he took off; and, then, I ran back and jump over my wife and took the wheel and took off (snapping fingers), although I didn't know where I was going or what I was going to do. If I would have been in my senses, I would have turned myself in right there, but I didn't know what I was doing.

Q. Are you a native of San Antonio?

A. I am.

[fol. 144] Q. Where did you go to school?

A. David Barkley.

Q. David Barkley?

A. Yes, sir.

Q. And did you serve in the second World War?

A. I did, three years and ten months.

Q. I'll ask if that's the discharge they gave you (exhibiting document to witness).

Mr. Barrera: If it please the Court, we are going to object to this.

The Court: That will be sustained; it is immaterial.

Q. (Mr. Lipscomb continuing:) Then, when you got out of the army, where did you work first?

A. When I got out of the army?

Q. Yes.

A. Well, different places. I went up west and went around until I found this job up here at Kelly Field.

Q. How long did you work at Kelly Field?

A. Three years.

Q. How long?

A. Three years.

Q. Three years?

A. Yes, sir.

Mr. Lipscomb: I believe that's all.

[fol. 145] Cross-examination.

Questions by Mr. Barrera:

Q. (Exhibiting State's Exhibit No. 1, page 1, to witness:) Alvaro, is this your signature?

The Court: Speak louder, counsel.

Q. Is this your signature?

A. (After examination of document referred to:) Yes, sir, it is.

Q. (Exhibiting State's Exhibit No. 1, page 2, to witness:) Is this your signature?

A. (After examination of document referred to:) Yes, it is.

Q. (Exhibiting State's Exhibit No. 1, page 3, to witness:) Is that your signature?

A. (After examination of document referred to:) Yes, sir.

Q. (Exhibiting State's Exhibit No. 1, page 4, to witness.) And that?

A. (After examination of document referred to:) Yes,

Q. (Exhibiting State's Exhibit No. 1, page 5, to witness:) And that?

A. (After examination of document referred to:) Yes,

Q. Did you sign those pages?

A. Yes, sir, I did.

Q. Did you read those pages before you signed them?

A. Yes, although they got something in there that—well, I was too disturbed at the time when I made it. You haven't even got there the kind of clothes I was wearing at the time.

Q. Well, what kind of clothes were you wearing at the time?

[fol. 146] A. I was wearing khahi pants and a nylon shirt.

Q. Well, didn't you tell us, "I do not remember where I threw my khaki clothes or where I threw away the knife"?

A. I am talking about the clothes I was wearing at the time.

Q. Were you wearing khaki clothes at the time you stabbed your wife to death?

A. No.

Q. Well, didn't you tell us here, "I do not remember where I threw my khaki clothes or where I threw away the knife with which I stabbed Herlinda, my wife"?

A. Well, the knife, yes, but not the clothes. I had khaki pants and a nylon shirt on.

Q. You had khaki pants and a nylon shirt?

A. Yes.

Q. Well, were those pants bloody after you stabbed your wife?

A. Sure they were; you know where the blood came from.

Q. Very bloody?

A. Yes; the blood came from where the rock hit my wife in the head because her head was laying up here on the side (indicating.)

Q. Were those pants very bloody?

A. They were.

Q. Now, you said you read the statement before you signed it, is that correct?

A. Yes.

Q. Now, did I abuse you or did Mr. Torres abuse you [fol. 147] or mistreat you?

A. No, they didn't.

Q. Did we curse you?

A. No.

Q. Did we threaten you into making a statement, Alcorta?

A. No, you didn't threaten me.

Q. Did anyone give you any reason to be afraid of us?

A. No.

Q. Didn't you voluntarily go with us to show us?

A. Well, not exactly because I wasn't in my senses; I mean, I was disturbed at that time.

Q. You mean at the time—

A. You put things in there that ain't right; I am trying to tell you the truth, that's all.

Q. Just answer my question, Alvaro. Now, here it is the 11th day of July, and you stabbed your wife to death on the 19th, the early morning of the 19th of June, is that right?

A. Yes.

Q. And you were caught on July 11, is that right?

A. Yes.

Q. And, meanwhile—

A. I wasn't caught exactly, I came back because I wanted to get my check and I wanted to be punished according to the law.

Q. Did you expect to be punished up north somewhere after you cashed your check?

A. Yes, sir, that's precisely why I went out there and [fol. 148] changed that check up there at the same place; I could have changed it any place I wanted to.

Q. That's right. Now, have you lived here in San Antonio the better part of your life?

A. Most of it.

Q. Do you know where the San Antonio Police Department and the Sheriff's office is?

A. Yes.

Q. Is that out Fredericksburg Road, towards Boerne?

A. Well, I don't know; it depends on what you are talking about.

Q. Well, you said you wanted to turn yourself in and that's why you came back to town. I just wanted to know if the San Antonio Police Department or the Sheriff's office was out towards Boerne.

A. I didn't say I wanted to turn myself in; I said I came back to be punished.

Q. Well, who did you expect was going to punish you?

A. According to the law.

Q. And you expect to be punished, don't you?

A. Sure I am.

Q. You have done very wrong, haven't you?

A. Sure I have.

Q. And you should be punished?

A. Sure.

Q. And you know that?

[fol. 149] A. I don't have no witnesses here or nothing and they don't let them talk or anything. Why can't I get a witness up here in my behalf? It is even in the Constitution of the United States that I be defended that way.

Q. Alvaro, what other witnesses were there when you stabbed your wife to death?

A. They only talk a few words and that is all there is to it.

Q. What other witnesses were there when you stabbed your wife?

A. Other witnesses?

Q. Yes.

A. There was only the driver of the car.

Q. Well, he was here, wasn't he?

A. Who, the guy that was driving?

Q. Castilleja?

A. Yes.

Q. He was here?

A. Yes, he was here.

Q. Now, you spoke about your wife and your troubles and your intentions to Esperanza Huron, didn't you?

A. Yes, but they are all lies; you advise them before they came here in court.

Q. I see.

A. That's what you did.

Q. Well, then, you didn't see Esperanza then on June 18 at Manny's Bar, did you?

A. Sure I did; I don't deny it, but I didn't know the [fol. 150] other women in there. Ask her if I ever had any relations with her.

Q. Alvaro, did you with the other girl that you don't know; isn't that the girl that you went over to the restaurant with?

A. Yes, sir; I took a present with her over there, but I didn't know my wife was going to get mad or anything like that.

Q. She was telling the truth about that, wasn't she?

A. I didn't tell her I was going to Mexico and all that stuff.

Q. You didn't tell her?

A. No. If I was going to Mexico, why didn't I go to Mexico? I came back.

Q. Is Laredo anywhere near Mexico?

A. (No response.)

The Court: Answer the question, Mr. Witness.

Q. Is Laredo near Mexico?

A. It is, and I didn't cross the river either.

Q. Is Mission, Texas, anywhere near Mexico?

A. Where?

Q. Mission?

A. It is all along the river.

Q. And Donna?

A. Yes, sir, and I came back.

Q. You didn't——

A. I didn't have no intention of leaving the check or anything like that; I came back.

Q. You didn't have any intention of leaving your check, isn't that right? That's the one you came to pick up?

[fol. 151] A. My check, yes; I deliberately changed that check so I could be caught, in other words. Would I have been so dumb to go up there and change my check where they knew me and tell them that I was going to change my check?

Q. But you did change your check?

A. I did deliberately.

Q. You didn't go over to see your children at the time that you came in, did you?

A. What?

Q. You didn't go over to see your children when you came back into town?

A. I didn't know where they were. That's why I changed the check and I was taking off to see—I needed some time to know where my children were; don't think I don't love my children, I do.

Q. Did you ask anybody where your children were?

A. I couldn't ask nobody; I mean I had to get, figure it out to get information to somebody to find out or something.

Q. Well, were you going to get information out on the San Marcos Street bridge over there?

A. Well, I had to get that check.

Q. You had to get the check?

A. Yes.

Q. That's what I understand.

A. Yes.

Q. So you came back to get the check, isn't that right?

[fol. 152] A. Yes.

Q. And you did?

A. Even now I don't know where my children are.

Q. You needed the money? They are being taken care of, I assure you, Alvaro.

A. Yes, in a hell of a way.

The Court: Don't argue back and forth.

Q. (Mr. Barrera continuing:) Did you cash the check?

A. Yes, I did it so I could get caught.

Q. How much money did you have when you got back into town here?

A. When I got back into town?

Q. Yes.

A. I didn't have none.

Q. You didn't have any, did you?

A. No.

Q. And you needed money?

A. Well, in a way, yes, I needed money.

Q. Now, Alvaro, with reference to your confession here, isn't it a fact that, after you read it, Alvaro, you made any number of corrections on this statement?

A. Well, you told me to put some signatures there, but I don't know what they mean or what they put them for; you told me to put some corrections there, my initials; you told me that, I remember that.

Q. You remember I told you——

A. But I don't know what the meaning of the words was [fol. 153] that was going there; I don't know what you figure it out.

Q. You don't understand English?

A. Yes, I do.

Q. Do you read English?

A. Maybe you made a mistake on a number of things there.

Q. I did make a mistake every once in awhile and you corrected it?

A. Or maybe it wasn't the way you wanted it.

Q. You corrected it and you put your initials by the corrections, didn't you?

A. Yes; that's the only truth you said when you read it to the jury, that's the only piece of truth you said when I signed my statement there. The rest is nothing but a frame-up, that's all it is.

Q. Alvaro, do you remember a young lady there by the name of Mrs. Josephine Foreman?

A. Josephine what?

Q. Foreman, the lady who was taking your statement down as you were—

A. I don't know her.

Q. Do you remember her?

A. She was taking my statement when you was asking me questions on the way, showing me the way because I couldn't remember the way, and she was putting if down in shorthand; I don't know shorthand.

Q. Yes. And do you remember Mr. Pete Torres?

[fol. 154] A. (No response.)

Q. Mr. Pete Torres was there, wasn't he?

A. Pete Torres was where?

Q. There in the county jail when you were giving this confession.

A. Well, there were quite a few in there; I don't know who they were.

Q. They saw you sign your name here (indicating on State's Exhibit No. 1), didn't they?

A. Well, yes.

Q. And they heard when you were told that you did not have to make this statement and that, if you made one, it could and would be used against you, didn't they?

A. Well, they gave me page by page to sign it.

Q. Yes.

A. Of course, I was too disturbed that morning to figure out what was on there.

Q. Well, why were you particularly disturbed that morning? You wanted to get caught you told us.

A. Yes.

Q. Well, what were you disturbed about?

A. Well, you know how it is when you have done something; you are not in your senses anyway when you have done something.

Q. Were you in your senses when you applied for a job with Joe Bowrey down in Donna and you worked there for three or four days? Were you in your senses then?

A. Well, not exactly.

[fol. 155] Q. Were you happy?

A. (No response.)

Q. Just answer my question, Alvaro.

A. (No response.)

Q. Were you in your senses or not?

A. Yes, I was then.

Q. All right. You knew you had to eat and you were hungry, isn't that right?

A. Yes; I didn't have to eat, he gave me food to eat. I didn't have to worry about that.

Q. He gave you food and you worked for him, didn't you?

A. Yes, I worked.

Q. And you picked cotton for several days?

A. And I was foolish enough to tell you that.

Q. You shouldn't have told me that, should you, and you shouldn't have told me that you had every intention to kill your wife and you don't know if you were sorry?

A. I wanted to tell the whole truth, but, anyway, it doesn't have to be a frame-up up here like they are doing it. I want to do right; I wanted to turn myself in, I wanted them to catch me and punish me but not the way you want to.

Q. How do you want to be punished, Alvaro?

A. Not the way you are putting it anyway, all those witnesses there.

Q. Let me ask you this.

A. It is a lot of lies and all of that.

[fol. 156] Q. You did have the intention of killing her, didn't you?

A. What?

Q. You did have the intention to kill your wife?

A. No, sir, I didn't have no intention to kill my wife at that time.

Q. You did not at that time?

A. No.

Q. You had threatened to kill her before, hadn't you?

A. What?

Q. You did threaten to kill her once before on Mother's Day?

A. No, sir.

Q. Didn't you give her a present of a black eye over at her house?

A. When they give me the $200.00 bond?

Q. No, sir. Hadn't you threatened to kill her?

A. You know what happened at that time they took me over there?

Q. Just answer my question, Alvaro. Hadn't you threatened to kill her before they put you under the $200.00 bond?

A. (No response.)

Q. Did you or did you not threaten to kill her on Mother's Day?

A. No, sir

Q. Were you placed under a peace bond?

A. Yes, sir.

Q. That was in Judge Talbert's Court?

A. You know what Judge Talbert told her over there?

Q. Was that in Judge Talbert's Court?

A. Yes, sir.

[fol. 157] Q. Alvaro, what did you intend to do when you stabbed your wife 32 times with that knife?

A. How could I stabbed my wife 32 times with the car going full speed and zig-zagging and being drunk and all?

Q. You did intend to——

A. She got cut from the bottom up to her head.

Q. How many times did you cut her?

A. She was sitting down in the car. How can you stab her like that? You can't do it.

Q. How many times did you stab her?

A. I don't know how many times. As I told you, the knife went back and the blade went back and it probably hit some bone or something.

Q. Did you intend to stab her?

A. And you didn't put that in the statement, did you?

Q. Did you intend to stab her, Alvaro?

A. Yes, I did; yes.

Q. Any number of times you intended to stab her and stab her and stab her?

A. I stab her; I mean I was just all carried away when I saw her with that guy and all of that. I was drunk, you get a man like that to think of everything like that, you get carried away and mad.

Q. Tell the jury. You didn't see your wife kissing that man, did you?

[fol. 158] A. I did saw her, in the front there. You know what, why I came back?

Q. Alvaro, did you tell me that at any time during the time that we all talked to you? When Mr. Torres was taking that confession, did you tell anybody that?

A. What?

Q. That you saw your wife kissing Castilleja.

A. No; you weren't going to put it in there.

Q. Did you tell us that?

A. No, I didn't told you; you didn't ask me, and I knew if I tell you, why, you won't put it there anyway.

Q. I see. Now, did you tell us that you thought something else was going to happen there in front of your wife's house?

A. Something else, did I told you?

Q. Yes, that if you had had a camera and so forth. Did you tell us that?

A. No, you won't put it there either; you want everything to your side, that's all. You want to do what you want.

Q. You didn't tell us that, did you?

A. No.

Q. Now, Alcorta, neither did you tell us that you had ever seen Castilleja before?

A. No; but I saw him kissing my wife there and that wasn't the only man she was going around with.

Q. Alvaro———

A. She had quite a few.

[fol. 159] Q. You didn't tell us that you had ever seen your wife with Castilleja before, did you?

A. No.

Q. And you didn't tell us that you had seen your wife dancing at the Radio Club or any place else with anybody, did you?

A. No, because you won't put it there anyway; you won't testify in court, the witnesses won't say nothing about it, but I saw her with my own eyes.

Q. Did you tell us and try to get it into your statement?

A. No, you won't put it there anyway.

Q. I see.

A. What's the use?

Q. I asked you to tell us all you knew about this case, didn't I, and Mr. Torres did too, didn't he, all that you knew about the case?

A. Well, sometime you can't do that in that case, like I was.

Q. Now, Alcorta, it is a fact that you told me this: "When I saw them stop, I started walking towards the car. I believe my wife knew it was me. I heard her saying something to the man she was with, but I couldn't hear what she said." Now, you just said that was what happened, isn't that right? You said that here on the stand?

A. Well, yes; in a way, yes.

Q. Well, that's what happened, isn't it?

A. No, it didn't happen that way.

Q. You just testified that's what happened, didn't you?

[fol. 160] A. Well, I testified that I saw my wife in a car and I saw them through the rear of the window that they were kissing.

Q. All right.

A. That's when it drove me mad, and I was drunk.

Q. And you also told us: "At that time she had the door of the car half way opened. Then I walked up. I took my knife out of my pocket as I was walking toward the car

about 15 feet from the car, a black handle pocket knife." You said that, didn't you, to me and to Torres and to the other people that were there, didn't you?

A. Yes, I was walking toward the car.

Q. You told us the description of the knife, that "it had two regular blades on it and then a small blade and a leather puncher"? That is what you testified?

A. I didn't say I stabbed her 32 times; that's what you got there.

Q. I know you didn't because you didn't stop to count them. But the witnesses have testified that there were 32 stabs.

A. Anybody can see that that's a lie.

Q. Yes, but——

A. I don't know how many times I stabbbed her; I know that I stabbed her any number of times.

Q. Well, you did stab her any number of times?

A. I did stab her nine times or so, maybe 15, but not 32; that is exaggerated.

Q. Were you counting the times when you were stabbing her?

A. That is what I told you, I was out of my senses; I wasn't thinking then.

[fol. 161] Q. You don't know how many times you stabbed her, do you?

A. No, I was drunk when I was doing that. You can't stab a woman sitting in a car running zig-zag and holding yourself on the running board and with a knife stab her 32 times from here (indicating) to her head.

Q. And it is a fact, Alvaro——

A. That's exaggerated too much.

Q. And it is a fact, Alvado, that you also told us this, "As I said before, I had taken about all I could stand from Herlinda and, when I approached the car in which she was sitting there by her house, I had decided to kill her"?

A. No, sir, you put it there.

Q. Did you read——

A. I never said that.

Q. Did you read that in your statement when you read it?

A. Well, yes, sir, but I was disturbed, like I told you.

Q. Did you make any corrections on it at that time?

A. Sure, but you don't, like I told you, there are some things in there that you put them on your shoe.

Q. Did you read it before you signed it?

A. And you don't know what you were putting, some others; like the clothing and the knife.

Q. Did you read it before you signed it?

A. If I had the knife——

Q. Did you read the statement before you signed it, Alvaro?

A. Yes, I did.

[fol. 162] Q. And isn't it a fact that you made corrections where you wanted to make corrections and initialed the corrections?

A. You didn't ask me to make any corrections; you could erase them back, part of them you had it in shorthand.

Q. Who put these initials on these pages?

A. Well, I did.

Q. Were those corrections you made?

A. (No response.)

Q. Isn't that right?

A. No.

Q. They were not?

A. I put my name there and I read it; but, you see, I was only thinking about one-fourth of every page is what I was thinking about. I wasn't in my senses.

Q. You weren't in your senses?

A. No.

Q. Now, you did take the officers out to all of these places that you had been to, isn't that right?

A. What?

Q. You did take the officers out to all of these places that you had been to, where you threw your wife down by the creek?

A. Well, I told them I didn't even know; you showed me.

Q. Did you see the——

A. I didn't know where I threw her or anything; you show me the way.

Q. Did you see the bloody handprint you left there on the creek abutment? Did you see that?

[fol. 163] A. What, the bloody hand?

A. Yes

A. That mark, well, I probably done it; I ain't denying it.

Q. I see. Well, then, that is true?

A. You told me which way I went when I left the car.

Q. This is true that——

A. You was the one that showed me that.

Q. This is true, that you did see the blood on the abutment there, didn't you?

A. I did so, yes; I don't know whether it is mine or not.

Q. And you said, "I had decided to kill her and I pulled my knife out about 15 or 20 feet before I got to the automobile and I did stab her. I don't know whether I am sorry or not and whether I would do the same again or not." Now, did I ask you if you were sorry?

A. Yes, you did.

Q. And didn't you give me that answer?

A. Well, you took it in another way when I told you that.

Q. Well, what did you say?

A. Of course, who isn't going to be sorry? That is why I wanted to be punished; that is why I came back.

Q. That is what I say, you are not sorry?

A. If I wasn't sorry, I would have taken down to Mexico like the witness said about awhile ago.

Q. You are not sorry about this?

A. Sure I am; that is why I am going to be punished.

[fol. 164] Q. "And whether I would"——

A. According to the law, not according to you.

Q. "And whether I would do the same again or not. Maybe I would." You told me that, didn't you?

A. Well, you took it in another way.

Q. I took it another way, that is what you told me, you didn't mean that?

A. You took it another way.

Q. You also said: "I know that I have done wrong, and I must be punished for it and no one has said anything to me about punishment. I killed my wife because I wanted to and——"

A. No.

Q. "—I have here confessed to the killing." Did you tell me that, Alvaro?

A. Not that I wanted to kill her; I had no idea she was with a man over there. I just wanted to see my kids be-

cause I had turned in my job and I was going to take off. That's all I wanted.

Q. Do you——

A. I even 'phoned my wife before.

Q. Do you always visit those kids, Alvaro, that you worry so much about, at 1 o'clock in the morning?

A. What?

Q. Do you always visit your kids at 1 o'clock in the morning?

A. When my wife used to come in at 3 o'clock from dances and all of that, and leaving them——

[fol. 165] Q. I am talking about your kids.

A. there, that is what made me mad.

Q. You were mad?

A. Sure, seeing my kids laying there. By the law, the Court, I've got the right to have those kids, but you won't admit the evidence; it's right there with my evidence, he's got those evidence.

Q. Do you always go see your kids at 1 o'clock in the morning?

A. Not always, every now and then.

Q. Did you go that time?

A. Well, I was going to—I went there later I mean earlier, but she wasn't there.

Q. Well, you went to see your kids?

A. Not only one time, I went many times to see her.

Q. You went to see your kids, not your wife?

A. She was not there; she was some place else, dancing and drinking.

The Court: Just confine yourself to the answer, Mr. Witness.

Q. You went to see your kids on that date, didn't you?

A. I want to see my kids before I left, yes.

Q. And you went at 1 o'clock in the morning?

A. Yes, sir.

Q. Is that when you visit your kids?

A. Well, my wife wasn't there, and I went earlier, like I told you; I went earlier but she wasn't there.

[fol. 166] Q. Earlier you were over at Cervantes' drinking beer, weren't you?

A. Well, that's when I went there to see my kids, but I didn't see nobody.

Q. Earlier you were at Manny's Bar drinking beer, weren't you?

A. Yes, I was.

Q. And, still earlier, you had gone over to your wife, whom you loved so much, with another girl?

A. Yes, with another girl, but I didn't mean nothing bad by that; I even had a present to give her.

Q. You didn't mean to antagonize her, did you?

A. Why, no.

Q. But, yet, you picked up this B girl out of the saloon and went down there to visit your wife, whom you wanted to make up with, and you took a B girl over there, didn't you?

A. Well, I took a present, that's all I know. I didn't mean nothing bad about that.

Q. Isn't it a fact, Alvaro, that you wanted to take this girl over there so that she could see you could?

A. That's a lie, I had no intentions of anything like that.

Q. Why did you take that girl over there?

A. She wanted to go with me and I never told her I wanted to go to Mexico, and do this or that; that's a lie, that's not true.

Q. Alvaro, did you have your suitcase already packed?

A. Yes, sir, I had it; I had it.

[fol. 167] Q. You were all set?

A. Honest to God, I had it, but——

Q. And where were you going, Alvaro?

A. Well, I just wanted to leave town, that's all.

Q. Where were you going?

A. Just north, any place.

Q. North or south?

A. I didn't want no part of it, just like it happened.

Q. And, at the time this happened, it is a fact that you already had your suitcase in a saloon down here packed?

A. Yes, I had my suitcase packed, but I wanted to see my kids before leaving. Instead of seeing my kids, I saw my wife kissing another man.

Q. At 1 o'clock in the morning?

A. At 1 o'clock; she was in the car with that man, kissing in the car. I caught her with a man and everything.

Q. At what time did you go to see your kids earlier in the afternoon?

A. I don't know; I couldn't hardly tell, I never noticed. Well, it was about 11:30, something like that.

Q. 11:30 in the morning?

A. No, no, at night.

Q. At night?

A. Yes.

Q. That was earlier?

A. Yes, about 11:30.

[fol. 168] Q. 11:30. And, then, you waited there until 1 o'clock until you could see your kids?

A. No, sir, I didn't wait there; I went to Cervantes' and stayed there and drank a few beers.

Q. Did you knock on the door?

A. What door?

Q. On the door of the house where your kids were sleeping.

A. No, I didn't see nobody over there. Most of the time a car is there, and they've got the light on. I know my wife most of the time is out when they've got the light on.

Q. Do your kids drive a car?

A. No, I mean my wife; I don't mean my wife, my kids.

Q. You say you wanted to see your kids and you went over there to see your kids?

A. Yes, but the light was out, I didn't see nobody.

Q. All right. Did you knock on the door?

A. No, sir, I didn't knock on the door.

Q. Well, then, you didn't ask anybody to see if your kids were there or not, did you?

A. No, because I knew my wife was not there.

Q. You went to see your kids, not your wife.

A. But I have to see my wife in order to see my kids, don't I?

Q. I don't know, do you?

A. Yes; I know I have to see my wife before I see my kids because I give my wife my kids to take care of.

Q. Are you afraid of your wife?

[fol. 169] A. No, sir, I am not afraid.

Q. Has anyone ever denied you the right to see your kids?

A. Well, sometimes she did; sometimes she didn't.

Q. Now, Alvaro, when you saw your wife, you say that you saw her over at this Radio Club, you saw her with many guys?

A. Not many guys, I saw her with this guy here, Castilleja; I saw him about two or three times.

Q. Where did you see them?

A. Over here at the Radio Club.

Q. When did you see them?

A. Well, I don't remember the date or the time or anything; it was at night though.

Q. It was at night?

A. At night.

Q. And what were you doing there, Alvaro?

A. Where?

Q. At the Radio Club.

A. I wasn't at the Radio Club; I never danced in my life. I was outside.

Q. Well, you saw them at the Radio Club, didn't you?

A. Yes.

Q. Where did——

A. Not one time, many times.

Q. Where did you see them, outside or inside?

A. Inside; they were dancing.

Q. And where were you when you saw them dancing?

[fol. 170] A. On the outside across the street.

Q. Outside across the street?

A. Yes, sir.

Q. At that time, did you go up and say anything to Castilleja or your wife?

A. No, sir, I never did bother them.

Q. Why?

A. What?

Q. Why?

A. Why didn't I told them not to?

Q. That's right, why?

A. Well, I just didn't have the idea, I just thought——

Q. You didn't have the idea that that was your wife dancing with Castilleja?

A. Sure it was; I wasn't too sure, I wanted to make everything sure. You just can't, when you see your wife, and you can't tell him—with a guy—you can't tell him,

why, I am going to knock the block off of him; I've got to find out.

Q. Then you weren't sure that was your wife at that time?

A. Yes, I was sure it was my wife; I saw it when she climbed those steps.

Q. Then you did know it was your wife? You were sure it was your wife?

A. Yes.

Q. Didn't you——

[fol. 171] A. She was dancing with a man.

Q. Why didn't you do anything about it at that time?

A. Well, I didn't, well, I wasn't sure, like I tell you.

Q. Sure of what?

A. Well, that she was going around with him or anything like that; I had to find out.

Q. She was dancing with him?

A. Well, that don't mean nothing.

Q. That doesn't mean anything, does it?

A. No.

Q. If she was dancing with these other fellows, that doesn't mean anything either?

A. A lot of times I used to take her down to the dance hall to dance because I didn't dance; I was that good to her.

Q. The fact you dance with other people occasionally, that doesn't exactly mean there is anything wrong either, does that?

A. Not exactly, it depends.

Q. So, when you saw your wife dance with Castilleja, if you saw her——

A. I did saw her.

Q. —they weren't doing anything wrong, were they?

A. No, not dancing.

Q. I see. Well, did you see them ever doing anything wrong?

A. Well, not exactly, except that night when I saw them there, that last night I saw them there.

[fol. 172] Q. And that's the night you told us in detail here about in your confession?

A. Well——

Q. Is that right?

A. Yes.

Q. And that's the same night that you failed to tell us anything about Castilleja kissing your wife?

A. Well, I didn't told you that; I just didn't remember.

Q. I know. Well, that's why you killed your wife, isn't it?

A. Like I told you, if I had had a camera and waited a little longer, it would have been a different story; I would have brought the picture and showed it to you.

Q. Isn't that why you killed your wife?

A. What?

Q. Isn't that why you killed your wife, because she was kissing Castilleja?

A. In a way, yes, sir; and she wasn't taking care of the kids either.

Q. And, yet, you forgot to tell us that in your confession?

A. Well, yes.

Q. Now, you made the statement that your wife was up north somewhere drinking and dancing and going out with fellows.

A. I didn't make that statement; that can be proved by the cousin of my sister.

Q. Didn't you just testify here to that effect?

A. That can be proved.

[fol. 173] Q. Didn't you just testify to that effect?

A. To what?

Q. That your wife was up north, up in West Texas, or wherever she may have been, and that she was dancing and drinking and going out.

A. Yes.

Q. Did you see her?

A. No, but a cousin of hers saw her.

Q. I see.

A. I mean that testimony was given by her sister who went with her to the west, with her; she was going around with her all the time while she was over there and they went dancing and drinking and all of that. I didn't even knew it; she went up there to see her mother. She never saw her mother up there, she was just going around and I didn't know about it.

Q. Now, it is a fact you were going into Manny's Bar every two weeks for a good long time?

A. After what happened, why, after she was gone, I had

my kids by the Court and I tried to get my divorce and I couldn't.

Q. And you sat there drinking beer with these girls?

A. What?

Q. It is a fact that you were drinking there with these girls every two weeks?

A. Well, every now and then, yes; every two weeks about. On Friday, pay day, I drank a few beers.

[fol. 174] Q. Do you know how your wife felt about that?

A. Well, not exactly; she wasn't here.

Q. Alvero, isn't it a fact that, not on one but on two occasions, she went to the very same saloons in which you were drinking to try to get you out?

A. She was drunk too.

Q. She tried to get you out of Manny's Bar?

A. Her mother took her out and she was drunk.

Q. Her mother slapped her and told her that if you wanted to spend your money that way, it was your business?

A. I don't know what she told her.

Q. You don't know what she said?

A. She was over there and she was drunk herself. When she left, I told her to leave me alone, just forget about the whole thing.

The Court: Wait just a minute. Just a answer his questions.

Q. Now, Alvaro, you say you did not make any statements to Esperanza Huron about killing your wife or anything like that?

A. Not intentional like you say, that I had the intentions. When I was getting near the car that I decided to kill her. I didn't decide to kill her then; I didn't know what was going to happen.

Q. What did you tell Esperanza Huron?

A. Remember that she was with a man.

Q. What did you tell Esperanza so unintentionally?

[fol. 175] A. Told Esperanza what?

Q. What did you tell her about your wife?

A. Well, I used to go there and I never did get acquainted, you know, with all the women or anything like that; but it just happened that way, we started talking, that's all.

Q. All right. Now, what did you tell her?

A. Tell her what?

Q. What did you tell Esperanza about your wife?

A. Well, several things when we got to talking.

Q. What did you tell her?

A. I don't remember.

Q. It is possible you did tell her, "You are going to read about me in the paper Monday"? That's possible?

A. I never said that.

Q. You are sure of that?

A. Yes, I am sure of it.

Q. You do remember that you never said that?

A. No.

Q. But what you may have told her, you don't remember?

A. Well, I might have been drunk though; I used to drink plenty there.

Q. I see. Now, it is a fact that you also told her that you were going to kill her? You told the other girl, Dominga Soto, that you were going to kill her?

A. No, sir, I didn't say that either.

Q. And you were going to Mexico?

[fol. 176] A. I didn't even know that woman. I only brought that present to take to my wife, and she went with me, that's all; I didn't have no relations whatsoever with her.

Q. What did you tell Dominga Soto?

A. What did I told Dominga?

Q. Yes.

A. I didn't tell her nothing, only that I wanted to take that present and all of that; she didn't even knew we were going down to my wife; I didn't tell her nothing.

Q. Isn't it a fact that Dominga told you, "You had better not do anything to your wife; if she doesn't love you or you don't love her, you had better leave her alone"?

A. Well, no.

Q. She told you that, didn't she?

A. Not to me, Dominga.

Q. Not to you. Who did she tell it to?

A. I didn't tell it to nobody; that is something that is just made up, that's all. How come, when they come here, they say about going to Mexico and all of that stuff? I never said a word about that.

Q. You mean Dominga made it up?

A. You did; you got everything framed up here, that's all.

Q. And did Esperanza make her testimony up?

A. Well, her testimony, part of it is right and part of it is just a lie, that's all.

Q. Did you hear the Doctor testify that there were 25 to [fol. 177] 30 stab wounds on your wife's body?

A. Yes, I heard that.

Mr. Lipscomb: 22, wasn't it?

Q. The Doctor testified 25 to 30?

A. Yes.

Q. And the officer counted them?

A. You can not do that standing on the running board and the car going zig-zagging and——

The Court: Just confine yourself to the question asked, Mr. Witness.

Q. Did you hear Officer Saenz testify that he counted 32 stab wounds on your wife's body?

A. That is what he testified to.

Q. That's framed up?

A. He didn't say anything about the injury or wound on her head.

Q. Is that a frame-up?

A. Sure it is; I betcha my wife got the wound on her head because I am positive she was hit with the rock.

Q. In addition to that wound on the head, did you hear the officer testify that there were 32 stab wounds on the body?

A. She didn't have no 32, that's a lie.

Q. There weren't 32 stab wounds on the body?

A. I didn't count them, how many times I stabbed her.

Q. You could have stabbed her 32 times?

A. 32 is too many; and the places she had them, that's impossible too the way everything happened; you can not do that standing on the running board and the car going [fol. 178] zig-zagging and my wife the way she was. That is impossible.

The Court: Do you have any further questions, counsel?

Mr. Barrera: No, your Honor, that's all.

Mr. Lipscomb: I would like to ask one more question.

Redirect examination.

Questions by Mr. Lipscomb:

Q. I didn't understand about Castilleja and your wife. Was she kissing him or he was kissing her that last time you saw them together?

A. Well, I don't know exactly which way it was; but they were kissing that's all. I saw them through the shade of the light from when a car was coming on the opposite direction.

Q. You saw them kissing in the car?

A. Yes, sir.

Mr. Lipscomb: That's all.

Recross-examination.

Questions by Mr. Barrera:

Q. Just one more question. You knew that your children were being taken care of that night by your mother-in-law, didn't you?

A. No, sir, I never—I didn't knew that; I didn't want it that way because, by the Court, I had my kids by the Court; [fol. 179] But I gave the kids to my wife to see if she would straighten up a little bit.

The Court: The question he asked you is: "Did you know your mother-in-law was taking care of your children that night?"

Q. (Mr. Barrera continuing:) Did you know that?

A. What?

Q. That your mother-in-law was taking care of your children and that your mother-in-law lived there.

A. Well, yes.

Q. You knew that, didn't you?

A. But I don't know if the kids were there or not.

Q. Did you think they were with your wife?

A. Well, most of the time, they take off and leave them one place and then another; they don't have no place to leave them, I mean to stay.

Q. Well, if you didn't know the kids were there, why did you go there to see the kids?

A. Well, we never had the—I mean, we never could get

along right. I plead with her and tell her, "Why don't you tell my wife to go to do something decent?"

The Court: Just answer his questions, witness.

A. She never will agree. She just lets her go any place she wants to and any time she wants to come——

The Court: Just answer the questions he asks you.

[fol. 180] Q. (Mr. Barrera continuing:) Did your mother-in-law ever take care of your kids?

A. Well, yes, at certain times when my wife wanted to go out.

Q. She is taking care of your kids now?

A. I don't know where the kids are. I have been trying to get my lawyer to find out, trying to get where they are. I want to take care of them; I want to give them to my sister or something——

Q. Yes.

A. —to give them a good education.

Q. Your kids were there on Mother's Day of this year when you went over there and beat up your wife and beat her and threatened to kill her?

A. Yes, they were laying there on the floor, on a dirty quilt. It made me mad, and that's why I hit her.

Q. Have you provided a bed for them to sleep on since that time?

A. Yes, sir, I used to give her money for that.

Q. A bed for them to sleep on?

A. And I gave her a bed too.

Q. Is that bed with the kids too now?

A. And a mattress and everything.

Q. When did you take that bed over there?

A. When?

Q. Yes, sir.

A. Well, that was a little while after I gave the kids to my wife, because I couldn't have them no place because she [fols. 181-203] went over there and make trouble.

Mr. Barrera: O.k.; that's all.

Mr. Lipscomb: That's all.

[fol. 204] JUDGE'S CERTIFICATE TO RECORD

The above and foregoing having been examined and found correct, is approved and ordered filed as the Statement of Facts in Cause No. S-54370, THE STATE OF TEXAS VS. ALVARO ALCORTA, this the 9th day of December, A. D. 1955.

Joe Frazier Brown, Judge, Criminal District Court No. 2, Bexar County, Texas.

[fol. 204a] IN THE CRIMINAL DISTRICT COURT NO. 2 OF BEXAR COUNTY, TEXAS

VOLUNTARY STATEMENT OF ALVARO G. ALCORTA

Monday, July 11th, A. D. 1955.

I, Alvaro G. Alcorta, being first duly warned by Pete N. Torres, the person to whom this statement is made, to the effect:

First—That I do not have to make any statement at all.

Second—That any statement made by me may and will be used in evidence against me in the trial of the case concerning which this confession or statement is made, do hereby voluntary state as follows:

My name is Alvaro G. Alcorta. I live with my father, Juan Alcorta, at 1118 Elvira, San Antonio, Bexar County, Texas. I am 35 years of age. I have worked at Kelly Field for three years as a mechanic. I have three children, three boys. I have been married seven years. We were married on December 17, 1947, here in San Antonio by the justice of the peace, Buck Jones. We had been separated ten months. We separated on October 25, 1954. I remember because that was my birthday. My wife and I had had some trouble on Mother's day during May, 1955. I was under a peace bond from Judge Talbert's Court. On Friday, June 17th, 1955, I quit my job at Kelly Field at around noon. I just gave as a reason that I was going to look for another job, but that was not true. I intended to leave town and that's why I quit. At around 3:00 o'clock that same day I went to the Gonzales Cafe with a girl, I don't know her name. I had bought a present for my wife,

it was a bracelet and some earrings and I offered the present to her, but my wife refused it. The girl I was with then told my wife, "I'm sorry, but I did not know he was married." Herlinda replied, "Yes, he's married and I'm his wife and he has three children." Then I told her, "Well, how about last night." She did not say anything then. She then returned to the cash register counter and gave the cashier the money and began to cry. She then went back to wash the dishes. Saturday night the woman and I went to Manny's Place where we had been earlier. After we were there a while, we met Esperanza Huron, who joined us and later two fellow employees, Castoreno and De Leon, joined us and we sat there a while and drank beer. From there . . . . I stayed there about three hours. It was almost dark. I went to a little bar on Ferndale and Stonewall. I bought about six bottles of beer there. I talked to the bar tender there, Jesse Cervantes, I left there when they closed. I bought the six bottles of beer then and took them outside and drank them outside. From there, I stood outside for a long time. I drank my beer slowly. From there, a car came along and they asked me, "Doesn't Jesse have any beer?" I told them he had already closed and they asked me, "Can you wake him up." and I told them no he did not sell beer after hours. He was afraid to. I still had three bottles of beer left. I stood there until about 1:30. Then the same ones came by again. They wanted me to give them one of my beers. I said no that I wanted to drink them myself. From there, I went over to see my wife. I was walking along the street getting pretty close to the corner where my wife lives and a car came by and then a second car came by. And the second car was the one that my wife was in. He stopped about ten feet from a tree located in the next lot from her house. That's where the car was parked. When I saw them stop, I started walking towards the car. I believe my wife knew it was me. I heard her saying something to the man she was with; but I couldn't hear what she said. At that time she had the door of the car half way opened. Then I walked up. I took my knife out of my pocket as I was walking toward the car, about 15 feet from the car, a black handle pocket knife. It had two regular blades on it and then a small blade and a leather puncher. I walked up to the car, and she had the [fol. 204b] door partly opened. I opened the door com-

pletely. When I got to the door she said, "Mira, Alvaro." At that time was when I stabbed her. I know that I stabbed her. I don't know how many times. I know I stabbed her any number of times. The first time I stabbed her, she said "Ay, Mama." The reason I stabbed her was because she was going out and not taking care of the children. After I started stabbing her, I don't know how far the car moved. The car was parked a little past the house about ten feet from the tree and that's where I started stabbing her. I thought it had moved just a little ways, but it moved quite a bit and it came to rest on the left hand side of the street, when it stopped. As I was still stabbing my wife, Castilleja threw a large rock at me about the size of a cantaloupe, and I ducked. At or about that time, my wife was beginning to stand up, and I think the rock hit her, but I am not sure. Then she fell into the car seat and didn't move any more. When this happened I started running after Castilleja when my knife still in my hand. He ran away from me, and I then stopped and got into the car, but I had to jump over my wife's body because the driver's door would not open. I then took off fast. The door on my wife's side was still open and my wife's legs were hanging out the car seat. The door remained open as I headed west on Brunswick and turned left on the Somerset Road. I don't know if I am sorry for what I did or not or if I would do it over again. My wife had made me mad, and I had just gotten tired of it. I continued out Somerset Road going south. I crossed Military Highway and turned off Somerset Road on to Palo Alto Road. I drove I don't know how many miles until I got to a paved road leading off to the right. I followed this road to the next paved road running into it and I turned left. I continued on this road and drove for a number of miles. I don't know how many until I came to a bridge, which I know now is the bridge over the Atascosa Creek. As I passed it, I pulled my car over to the side, got out. I came around on my wife's side then I pulled her out of the car. I started to drag her over by the bridge, so I grabbed her by the armpits and pulled her like this with her legs, dragging her for about 150 feet to the bridge. I pulled the body down on to the creek bed, and I put it there up against the bridge embankment. While I was doing this, I somehow put my bloody hand on the concrete, and then I straightened out. The ground was

wet or very soft and I remember this. I do not remember if I covered her with an apron or not. I was not worried about this. I then went back to the car got in and drove off. I still had the knife with me and my khaki pants, shirt and hands were bloody. I know that I still had my knife with me. I don't know how many miles I drove on this road until something went wrong with the car and it stopped. I pulled it over to the side and got out. I left the car and started walking and walked away. I don't know if I walked back from where I came from or forward to where I was going, but I do know that I walked away from the car. I stayed on this road for quite a while and then I got under a tree and went to sleep. It was almost day light when a man woke me up calling me Frank. He thought I was someone else and he apologized to me. It was a Mexican man driving a pick-up truck and he had two young boys with him. He left and I saw him go into a water melon patch. I then started walking on down the road. Later while I was [fol. 204c] still walking, this same truck drove by and he asked me if I wanted a ride and I got in the truck and he gave me a ride all the way to Pleasanton. This man asked me why I had the blood on my pants, and shirt and I told him I must have gotten in a fight with somebody and he must have left me on the road. He took me all the way to Pleasanton where there were some trucks parked selling water melons. I got off there and he stayed there. I then walked down a side road to a place where the road comes down and crosses the river. I got into the river with all my clothes on except my shoes, washed the blood off of me and my clothes, got out, and started walking to the bus station, which is a gas station and cafe and my clothes were almost dry when I got there as the sun was very hot. It was almost noon. I asked a tall, thin American bus driver where the bus was going and told him I wanted to go to Laredo. He took me inside the cafe and I bought a ticket there from a lady in his presence. I paid $3.50 for the ticket. I then got on the bus and rode to a town which I believe is Freer, and I changed buses and went on to Laredo. I left Pleasanton about twelve o'clock noon. I got to Laredo about 2:30 or 3:00, may be a little later. I got off at Laredo and walked to the outskirts to highway 83 that goes to Falcon Dam or in that direction. I walked on this road for a while and a salesman, who bought broom corn gave me a ride in a 1955

Chevrolet. I road with him all the way to Falcon Dam, and we fooled around Falcon Dam for a while and then went on to a little town which I believe is Roma. There in Roma, he went to eat and to call his wife long distance to New Mexico and I waited for him on the outskirts, but he never came by. While in Roma, I bought some clothes, some pants and a shirt, and some blue sox. I then hitchhiked on to Rio Grande. About 70 miles out of Rio Grande, two immigration officers stopped me and asked me a lot of questions about where I was from, what I was doing out here, where I was going, and so forth. They searched me and found about $13.00 that I had. They also found and saw a $25.00 war bond that I had in my name and my wife's name. I told them the truth about everything except that I had stabbed my wife to death and I was running away from the police. Then they gave me a ride all the way to Mission, Texas. At Mission, Texas, I took out my Kelly Field identification tag, which I had hidden underneath my belt and which they did not find and I put it in one of the large iron mail boxes. I never stopped at any hotel or tourist court because I knew that I had to register and sign my name and that this would cause me to get caught. I just slept on the outskirts of these towns wherever I could. From Mission I hitchhiked to Weslaco. I went to Weslaco, Texas, and from there I came back to Donna, Texas, looking for cotton picking job. There I met some fellows who were going to be taken to a farm, and I went with them. I picked cotton there on a farm a few miles out of Donna for a man by the name of Joe Bowrey. I worked there for about 2 or 3 days until some immigration officers came around talking to wetbacks and although they did not talk to me, I decided to leave and I went back to Donna. There at a restaurant on Friday afternoon, I was in a place where there were a lot of wetbacks drinking beer and dancing, and I did not know how to get out of there, so I ordered a menudo and although I had the money I refused to pay [fol. 204d] so that I could be arrested and gotten out of there. The man called the law, and I was put in jail and stayed there from Friday afternoon until Tuesday morning, July 5th, when they took me out to work off the $15.00 fine for drunk, and I worked Tuesday, Wednesday, Thursdays, and half day Friday. I was released at noon Friday. When they booked me, I told them my name was Henry

Mendez. I was not finger-printed, and they did not take my picture. From Donna, I hitchhiked to Pharr, Texas, and from Pharr, I came into San Antonio and got into San Antonio in the afternoon, Saturday, July 9th. Saturday night, I slept under a bridge there on San Marcos Street, close to the stockyards and Sunday morning I went over to my father's house at 1118 Elvira. It was in the morning and the sun already had come out. My father keeps a key in a little box, and I got the key, opened the house and went in and got my Kelly Field check from the chest of drawers, and then left. I walked around and come in to the business district of town for a while and then I came back out to the bridge where I had slept Saturday night and slept there again Sunday night. This morning, Monday, July 11, 1955, at or about 8:30 I went over to the Kinard Loan Company on Dolorosa Street after having first called them on the telephone and asked them if they would cash my $326.00 check. I owed them about $30.00. They told me they would so I went and cashed it and paid them what I owed them. I then walked over to the drug store on the corner of Laredo and Dolorosa and there I bought a pair of dark sun glasses and I then caught a cab and told him to take me out Fredericksburg Road. He drove me out Fredericksburg Road about nine miles and then I told him to let off. I paid him $5.25. I continued walking out Fredericksburg Road and then a man driving a wrecker gave me a ride all the way to a garage and restaurant where we stopped. I believe it was close to Boerne, but I am not sure. There I was arrested by the Highway Patrol and brought back to San Antonio.

I have on this 11th day of July, 1955, taken the officers from the Police Department, the Sheriff's Office and the District Attorney's Office out to show them where I stabbed my wife on Brunswick, the route that I took in getting out to the Atascosa Creek bridge where I hid my wife's body by the bridge, back to the water melon stand in Pleasanton where the man let me off, down to the river where I washed myself off and over to the bus station and restaurant where I bought the ticket to Laredo. I do not remember where I threw my khaki clothes or where I threw away the knife with which I stabbed Herlinda, my wife, any number of times. As I said before, I had taken about all I could stand from Herlinda and when I approached the car in which

she was sitting there by her house, I had decided to kill her, and I pulled my knife out about 15 or 20 feet before I got to the automobile and I did stab her. I don't know whether I am sorry or not and whether I would do the same again or not. May-be I would. I understand that I do not have to make this statement and that this statement which I have made will be used against me in the trial of [fol. 204e] this case. I have been told this by Mr. Pete Torres in the presence of Mr. Roy Barrera, Mr. Eddie Campa, Mr. Albert Saenz, and Mrs. Josephine Foreman, who is the lady who is taking my statement down as I was repeating it. I have read the statement, which I have made and read, write and I understand the English language and I understand fully everything that I have stated and read. I have not been threatened by anyone in any manner nor I have been promised anything by anyone. I know that I have done wrong, and I must be punished for it and no one has said anything to me about punishment. I killed my wife because I wanted to and I have here confessed the killing. I have not been mistreated by anyone but to the contrary when I was hungry in Pleasanton I had a malt and a hamburger and my handcuffs were taken off of me before I went into the restaurant. I sat at thet able with all the peace officers.

Alvaro G. Alcorta.

Witnesses:

James Therms, Homer L. Clance.

[fol. 205] In the Court of Criminal Appeals of the State of Texas

Application No. 316

Ex Parte Alvaro Alcorta

Original Application for Writ of Habeas Corpus—Filed February 22, 1957

To the Said Honorable Court:

Now comes your Petitioners in the above styled and numbered Cause, and file this, their Original Application for a Writ of Habeas Corpus before this Honorable Court,

as provided in Article 119, Code of Criminal Procedure of the State of Texas:

1. Alvaro Alcorta, a citizen of the United States of America, and a resident of Bexar County, Texas, is now illegally restrained of his liberty by O. B. Ellis, General Manager of the Texas Prison System, and or other persons or person whose names or name are not known to your Petitioners at this time. They are, however, employees of the Texas Prison System. Further, that Alvaro Alcorta, is now confined in the death cell at the Texas State Prison at Huntsville, Texas, awaiting execution.

2. The claim and authority by virtue of which Alvaro Alcorta is restrained of his liberty, and under which he faces execution and death in the electric chair, is a warrant for the execution of the death penalty, in Cause No. S-54370, in the Criminal District Court No. 2, Bexar County, Texas, styled the State of Texas vs. Alvaro Alcorta, a copy of the same being attached hereto and made a part hereof.

3. That the conviction, verdict, sentence and judgment upon which said warrant is based, and by virtue of which [fol. 206] Alvaro Alcorta is illegally restrained of his liberty; is void and should be set aside and held for naught for the reason that it constituted a denial of due process of law, guaranteed Alvaro Alcorta in the Fifth and Fourteenth Amendments of the Constitution of the United States, because all of the same were the result of, and based on perjured testimony against Alvaro Alcorta, and the suppression of evidence in favor of Alvaro Alcorta, which evidence was vital and material to the issues of Guilt and/or the punishment to be assessed by the jury in their verdict.

4. That in the trial of the above mentioned cause, one Natividad Castilleja, a witness for the State of Texas, testified under oath, among other things, that his relations with the deceased wife of the defendant, Alvaro Alcorta, were only that of a friend and neighbor, and that he had had no "dates", nor other relations with her, when in truth and in fact the witness had been her lover and paramour, and had had sexual intercourse with her on many occasions, the last time being shortly before he took her to her home where she was stabbed to death by her husband, the

said Alvaro Alcorta, the defendant in the trial court; and that such stabbing of the deceased took place when the Defendant, Alvaro Alcorta came upon his wife, the deceased, and said witness, Natividad Castilleja, when he found them at about 2:00 a.m. on the date of the homicide, sitting in an automobile in front of the home of the deceased.

Your Petitioners would further show that only recently, the witness, Natividad Castilleja, stated under oath, that he did not tell the truth, when he testified as a witness for the State of Texas, in the above mentioned trial, and further, that the District Attorney and or several of his assistants, were aware that his testimony was false, and en- [fol. 207] couraged the witness to testify as he did. That the same has now been admitted by certain members of the staff of the Criminal District Attorney of Bexar County, Texas.

(c) Your Petitioners would further show, that on February 8, 1957, one Roy Barrera, an Assistant Criminal District Attorney of Bexar County Texas, the leading Attorney for the State in the trial of the above mentioned cause, stated under oath, in a hearing before the Board of Pardons & Paroles, Austin, Texas, substantially as follows:

> "I will assume the responsibility. I am the person who told the witness, Natividad Castilleja to deny his sexual relations with the deceased. I told him it was not admissible unless brought up as a defense."

(d) Your Petitioners would further show that the Statement of Facts in the trial of said above mentioned cause will reflect that the Assistant Criminal District Attorney, Roy Barrera, on direct examination, and before the State had rested its case, asked the witness, Natividad Castilleja questions regarding his relationship with the deceased. That the witness, Natividad Castilleja gave answers designed to leave the impression with the jury that his relationship with the deceased was only that of a friend and neighbor. That the same was untrue and was known by Roy Barrera to be untrue, and that the said Roy Barrera sat mute and did nothing to correct such false impression. Further, that this conduct on the part of Roy Barrera amounted to a suppression of evidence to the extent that

Alvaro Alcorta was denied the right of Due Process guaranteed him by the Constitution of the United States.

[fol. 208] 5. That the above set out testimony on the part of the witness, Natividad Castilleja, was vital in its nature, and was material to the issues of Guilt and Penalty.

6. That said conviction, verdict, sentence and judgment and Warrant of Execution in the above styled and numbered cause is void, and should be set aside and held for naught, for the further reason that it violated Alvaro Alcorta's right to a fair and impartial trial guaranteed him in the Sixth Amendment of the Constitution of the United States.

7. That Alvaro Alcorta was denied rights guaranteed him in the Fifth, Sixth and Fourteenth Amendments, of the Constitution of the United States of America, in that a member or members of the staff of the Criminal District Attorney of Bexar County, Texas, suppressed evidence favorable to Alvaro Alcorta, which evidence was vital and material to the issues of Guilt and or Punishment, and would have mitigated the punishment in the trial of the above mentioned cause.

Wherefore, Your Petitioners pray that a Writ of Habeas Corpus issue, directed to O. B. Ellis, General Manager of the Texas Prison System, or to any other person or persons so holding the said Alvaro Alcorta, at the Texas State Prison, in Huntsville, Texas, commanding him or them, to have and produce the body of Alvaro Alcorta before this Court Instanter.

That this Court designate and direct any District Judge or Judges to ascertain the facts necessary for proper consideration of the issues involved. That the Official Court [fol. 209] Reporter of the District Judge or Judges so designated to forthwith prepare a narration of the facts adduced in evidence upon such hearing, and transmit the same to the Clerk of this Court within 10 days of the date of said hearing, as provided in Article 119, of the Code of Criminal Procedure of the State of Texas.

Your Petitioners would show this Court that a hearing was had on February 21, 1957, in the Criminal District Court No. 2, of Bexar County, Texas, in Cause No. S-93, styled Ex Parte Alvaro Alcorta. That the facts desired by your Petitioners and necessary for proper consideration

of the issues involved herein, were developed at such hearing. Therefore, your Petitioners pray in the alternative, that this Court order and direct the Judge of Criminal District Court No. 2, Bexar County, Texas, to instruct his official Court Reporter to forthwith prepare a narration of the facts adduced in evidence in said hearing, and transmit the same to the Clerk of this Court, within 10 days of the filing of this Application as provided in Article 119, of the Code of Criminal Procedure of the State of Texas, and in such event, the same be considered on this Application, not as one on appeal from Criminal District Court No. 2 of Bexar County, Texas, but as on an Original Application for a Writ of Habeas Corpus.

Your Petitioners further pray that this Court grant to Alvaro Alcorta such other and further relief to which he may be entitled under the Constitutions of the United States and the State of Texas, and the laws of the United States and the State of Texas.

(S.) Fred A. Semaan, Raul Villarreal, Petitioners.

[fol. 210] The State of Texas,
County of Bexar, ss:

Before me, the undersigned authority, in and for the aforesaid County and State, on this day personally appeared the Petitioners herein, who stated under oath that the foregoing facts are true and correct to the best of their knowledge and belief.

Subscribed and sworn to before me, on this the 22nd day of February, A.D., 1957.

(S.) Evangeline S. Hall, Notary Public, Bexar County, Texas.

(Seal)

[fol. 211] EXHIBIT TO ORIGINAL PETITION

No. S-54370

IN THE CRIMINAL DISTRICT COURT No. 2, BEXAR COUNTY, TEXAS

THE STATE OF TEXAS

vs.

ALVARO ALCORTA

WARRANT FOR THE EXECUTION OF THE DEATH PENALTY

To the Warden of the State Penitentiary, Huntsville, Walker County, Texas.

Greeting:

You are hereby commanded that whereas, on the 28th day of July, A. D. 1955, Alvaro Alcorta, a prisoner now in your custody, was indicted in the Special Criminal District Court of Bexar County, Texas, for the crime of Murder, and whereas on the 5th day of October, A. D. 1955, he, the said Alvaro Alcorta, was duly and legally convicted of said offense; and a judgment was rendered against him accordingly as follows, to-wit:

IN THE CRIMINAL DISTRICT COURT No. 2 OF BEXAR COUNTY, TEXAS, SEPTEMBER TERM, A. D. 1955

No. S-54370

THE STATE OF TEXAS

vs.

ALVARO ALCORTA

On the 3rd day of October A. D. 1955, the above entitled and numbered cause being called for trial, appeared the parties, the State by her Criminal District Attorney, and the defendant in person and by attorney, and both parties having announced ready for trial, and defendant having been duly arraigned came a jury of twelve (12) good and

lawful men, to-wit: George Heap and eleven others, who, having been selected, were duly impaneled and sworn, and the indictment having been read by the Criminal District Attorney, the defendant Alvaro Alcorta, in person, in open Court, pleaded not guilty to the charge therein contained; the said plea of not guilty was received by the Court and entered of record upon the minutes. And the Jury having been impaneled and sworn as aforesaid, and having heard the indictment read, and the defendant's plea of not guilty thereto, and having heard the evidence which was submitted, and having been charged by the Court and having heard the argument of counsel, they retired in charge of an officer. [fol. 212] And afterwards, having duly considered of their findings, they were again brought into open Court, by the proper officer, and returned into said Court, in due form of law, on the 5th day of October, A. D. 1955, the defendant and his counsel then and there being present, the following verdict, which was received by the Court and then read by the Clerk, and which is now entered upon the minutes of the Court as follows, to-wit:

No. S-54370

THE STATE OF TEXAS

vs.

ALVARO ALCORTA

We, the jury, find the defendant guilty of murder with malice as charged in the indictment and assess his punishment at death.

(S.) George Heap, Foreman.

Filed: Oct. 5, 1955, Hart McCormick District Clerk, Bexar County, Texas. By Luis Oronia, Deputy.

It is therefore considered, ordered and adjudged by the Court that the defendant Alvaro Alcorta is guilty of the offense of Murder with Malice, to which he has pleaded not guilty, and that he be punished, as has been determined by the jury, at death.

It is further ordered by the Court that the defendant be remanded to jail, there to remain in custody to await the further order of this Court.

And Whereas, afterwards, on, the 24th day of October, A. D. 1956, in the Court of Criminal Appeals of the State of Texas, the said judgment of the Criminal District Court No. 2 of Bexar County, Texas was affirmed, the Mandate of said Court having been received and now being on file in my office, to-wit:

[fol. 213] The State of Texas,
To Criminal District Court No. 2 of Bexar County—

Greeting:

Before our Court of Criminal Appeals, on the 24th day of October, A. D. 1956, the cause upon appeal to revise or reverse your Judgment between

No. 28080

ALVARO ALCORTA, Appellant

vs.

THE STATE OF TEXAS, Appellee,

was determined; and therein our said Court of Criminal Appeals made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended and this this decision be certified below for observance."

Appellant's Motion for Rehearing overruled.

Appellant's Second Motion for Rehearing overruled—without written opinion.

Wherefore, we command you to observe the order of our said Court of Criminal Appeals in this behalf and in all things to have it duly recognized, obeyed and executed.

Witness, the Hon. W. A. Morrison, Presiding Judge of our said Court of Criminal Appeals, with the seal thereof annexed, at the City of Austin, this 26th day of October A. D. 1956.

(S.) Glenn Haynes, Clerk.

(Seal)

[fol. 214] Filed Oct. 30, 1956. Hart McCormick, Clerk of the District Courts, Bexar County Texas, by Luis Orona, Deputy.

And Whereas afterwards, to-wit: on the 15th day of November, A.D. 1956 the Criminal District Court No. 2 of Bexar County, pronounced sentence upon the said Alvaro Alcorta in accordance with its judgment aforesaid, which said sentence is as follows, to-wit:

IN THE CRIMINAL DISTRICT COURT NO. 2 OF BEXAR COUNTY, TEXAS, NOVEMBER TERM, A.D. 1956

DEATH SENTENCE

THE STATE OF TEXAS

vs.

ALVARO ALCORTA

OFFENSE: MURDER

On this the 15th day of November, A.D. 1956, in the above entitled and numbered cause, again appeared in open Court, the parties, the State by her Criminal District Attorney, and the defendant, Alvaro Alcorta, who was brought in person before the court by the Sheriff for the purpose of having the sentence of the law pronounced upon him in accordance with the verdict and judgment heretofore rendered and entered against him, on to-wit: the 5th day of October, A.D. 1955, and it appearing to the Court that the said Alvaro Alcorta, having appealed from said judgment of this Court, to the Court of Criminal Appeal- of the State of Texas, and that the said Court of Criminal Appeals having by its decision on the 24th day of October, A.D. 1956, affirmed the said judgment of this Court, as is fully shown by the issuance of its Mandate, which has been duly received and filed in this Court by the Clerk of this Court, and the said Mandate having been heard and considered by the Court, the defendant Alvaro Alcorta was thereupon caused to stand up, and was then asked by the Court if he had anything to say why the sentence should not be pronounced against him to which he, the defendant, Alvaro Alcorta, answered "Nothing".

[fol. 215] Whereupon the Court in the presence of the

said defendant, Alvaro Alcorta, pronounced sentence upon him as follows: "It is considered, and ordered by the Court that you, Alvaro Alcorta, having been adjudged guilty of the offense of Murder, and whose punishment having been assessed by the Verdict of the jury rendered and entered against you herein at Death, be taken by the Sheriff of Bexar County, Texas, to the State Penitentiary at Huntsville, Walker County, Texas, and there to be executed by the Warden or Deputy Warden of the State Penitentiary, at said Huntsville, Texas, before sunrise on Wednesday, the 19th day of December, A. D. 1956, by causing to pass through the body of you, Alvaro Alcorta, a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through your body until you are dead.

And it is further considered and ordered by the Court that the Clerk of this Court, shall issue a warrant directed to the Warden of the State Penitentiary at Huntsville, Walker County, Texas, for the execution of this sentence of death, and shall deliver the same to the Sheriff of Bexar County, Texas.

And the said defendant is now remanded to jail to await the execution of this sentence."

Now Therefore, in consideration of the aforesaid premises, you are hereby commanded to execute the said judgment and sentence upon the said Alvaro Alcorta, in the State Penitentiary, at Huntsville, in the County of Walker, State of Texas, before sunrise on Wednesday, the 19th day of December, 1956, by causing to pass through the body of Alvaro Alcorta, a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the said Alvaro Alcorta, until he is dead.

[fol. 216] In executing this warrant of death you will observe all the requirements of the law in such cases made and provided. Herein fail not and of this Writ, and how you have executed the same, make due return in accordance with law.

Witness my hand and seal of office, this the 15th day of November, A. D. 1956.

Hart McCormick, Clerk of the District Court, Bexar County, Texas, by (S.) Luis Orona, Deputy. (Seal.)

[fol. 217] IN THE COURT OF CRIMINAL APPEALS

ORDER FOR HEARING—February 22, 1957

The attached application of Alvaro Alcorta for the writ of habeas corpus alleges that deliberate perjury was committed upon the trial of the case by an important State's witness and members of State's counsel were aware of such perjury and encouraged the witness to so testify. The application alleges further that a hearing was held on February 21, 1957, before the Judge of the Criminal District Court No. 2 of Bexar County in Cause No. S-93, at which time the facts touching the above allegations were developed. It is further made to appear that upon the hearing the Judge of said court refused to grant the writ of habeas corpus and to certify the application and facts so developed to this Court under the provisions of Article 119, C.C.P., as amended.

It Is Ordered that the hearing upon the application for permission to file the petition for the writ of habeas corpus is set before the Court of Criminal Appeals at 9:30 o'clock the morning of March 6, 1957. The Judge of the Criminal District Court No. 2 of Bexar County is hereby directed to forward to this Court on or before the day of hearing a transcript of the evidence developed as above mentioned.

Witness Our Hands in chambers this, the 22nd day of February, 1957.

(S.) W. A. Morrison, Presiding Judge. (S.) K. K. Woodley, Judge. (S.) Lloyd W. Davidson, Judge.

[fol. 218] IN THE COURT OF CRIMINAL APPEALS

Orignal Application

Ex parte ALVARO ALCORTA

ORDER DENYING WRIT OF HABEAS CORPUS—March 13, 1957

The application for the writ of habeas corpus was set for hearing because of the allegation therein that petitioner's conviction was void because deliberate perjury was committed upon the trial by an important state's witness

and members of state's counsel were aware of such perjury and encouraged the witness to so testify, and the further allegation that a hearing was held before District Judge Onion, of the Criminal District Court No. 2 of Bexar County, on February 21, 1957, at which time the facts touching the above allegation were developed.

We ordered the facts which were developed at that hearing forwarded to this court.

The record of said hearing is before us and it does not support petitioner's allegation, nor is it shown therein that the conviction is void, as alleged.

The conviction not being void, this court is without jurisdiction to issue the writ of habeas corpus.

The application for the writ of habeas corpus is denied.

In chambers, this the 13th day of March, 1957.

Lloyd W. Davidson, Judge. K. K. Woodley, Judge.

[fol. 219] IN THE COURT OF CRIMINAL APPEALS

Original Application

Ex Parte ALVARO ALCORTA

CONCURRING ORDER—March 13, 1957

I agree that the conviction is not void but feel that petitioner's contention should be stated and discussed.

Petitioner had been separated from his wife for ten months prior to the homicide.

The witness Castilleja told Assistant District Attorney Barrera prior to the trial that he had five or six acts of intercourse with petitioner's wife after her separation from the petitioner and prior to the night of the homicide. Barrera advised Castilleja to tell the truth if he were questioned at the trial about such illicit relationship but not to volunteer any information unless he was asked.

Barrera called Castilleja as a witness for the State, and, on direct examination, the following transpired:

"Q. Natividad (Castilleja), were you in love with Herlinda (petitioner's wife)?

"A. No.

"Q. Was she in love with you?

"A. No.

"Q. Had you ever talked about love?

"A. No.

"Q. Had you ever had any dates with her other than to take her home?

"A. No. Well, just when I brought her from there.

"Q. Just when you brought her from work?

"A. Yes."

It was not shown that any of the answers were untrue.

Petitioner's contention is that, since Barrera knew about the acts of intercourse at the time he called Castilleja to testify, the questions propounded to him on direct examination as set forth above, together with Barrera's admonition to Castilleja not to volunteer any information while a witness unless specifically asked, were tantamount to the suppression of evidence, that Castilleja's testimony at the trial was perjury, all of which deprived the appellant of a trial in accordance with the rules of due proces.

Though not without difficulty, the writer has concluded that petitioner's contention cannot be sustained.

Morrison, Presiding Judge.

(March 13, 1957)

[fol. 220] IN THE COURT OF CRIMINAL APPEALS OF TEXAS

MOTION FOR REHEARING—Filed March 16, 1957

Now comes the Petitioner in the above-entitled cause and respectfully moves the Court to set aside the judgment heretofore rendered in this Court on the 13th day of March, A.D., 1957, denying Petitioner's application for a Writ of Habeas Corpus and to grant a rehearing.

Wherefore, Petitioner respectfully prays that this motion for rehearing be granted and Petitioner be granted a Writ of Habeas Corpus.

(S.) Fred A. Semaan, Attorney for Petitioner.

[fol. 221] IN THE COURT OF CRIMINAL APPEALS

ORDER OVERRULING MOTION FOR REHEARING—March 18, 1957

Petitioner's motion for rehearing is overruled.

Morrison, Presiding Judge.

[fol. 222] Clerk's certificate to foregoing Transcript omitted in printing.

[fol. 223] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—May 27, 1957

On Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same, is hereby, granted; and that the petition for writ of certiorari be, and the same is, is hereby, granted. The case is transferred to the appellate docket as No. 1030 and assigned for argument during the week of October 14, 1957.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

May 27, 1957.

[fol. 224] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING STAY OF EXECUTION—May 27, 1957

On Consideration of the motion for stay of execution of the death sentence in this case,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

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FILED
AUG 19 1957
JOHN T. FEY, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 139

ALVARO ALCORTA,
Petitioner

vs.

THE STATE OF TEXAS

BRIEF FOR PETITIONER

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INDEX

SUBJECT INDEX

	Page
Brief for the Petitioner	
I. Opinions	1
II. Jurisdiction	3
III. Questions Presented	6
IV. Statement of the Case	7
V. Argument	12
VI. Conclusion	42

AUTHORITIES

CASES:	
Bales v. *Lainson*, 244 F. 2d 495	42
Griffin v. *United States*, 183 F. 2d 990	27
Mooney v. *Holohan*, 98 ALR 406, 55 S.Ct. 340, 294 US 103, 79 L.Ed. 791	21
Thompson v. *The State of Texas*, 29 SW (2d) 343	13
United States ex rel. Almeida v. *Baldi*, 195 F. 2d 815	19
United States ex rel. Montgomery v. *Ragen*, 86 F. Supp. 382	19
United States ex rel. Thompson v. *Dye*, 221 F. 2d 763	17
FEDERAL STATUTES:	
Amendment V, Constitution of the United States	3, 4
Amendment XIV, Constitution of the United States	3, 4
TEXAS STATUTES:	
Article 1256, Penal Code of the State of Texas	5
Article 1257, Penal Code of the State of Texas	5
Article 1257a, Penal Code of the State of Texas	5
Article 1257b, Penal Code of the State of Texas	6
Article 1257c, Penal Code of the State of Texas	6

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 139

ALVARO ALCORTA,

Petitioner

vs.

THE STATE OF TEXAS

BRIEF FOR PETITIONER

I. Opinions

1. Ex Parte *Alvaro Alcorta*—Order denying writ of habeas corpus, dated March 13, 1957, by the Court of Criminal Appeals of Texas:

> "The application for the writ of habeas Corpus was set for hearing because of the allegation therein that petitioner's conviction was void because deliberate perjury was committed upon the trial by an important state's witness and members of state's counsel were aware of such perjury and encouraged the witness to so testify, and the further allegation that a hearing was held before District Judge Onion, of the Criminal District Court No. 2 of Bexar County, on February 21, 1957, at which time the facts touching the above allegation were developed.
>
> "We ordered the facts which were developed at that hearing forwarded to this court.

"The record of said hearing is before us and it does not support petitioner's allegation, nor is it shown therein that the conviction is void, as alleged.

"The conviction not being void, this court is without jurisdiction to issue the writ of habeas corpus.

"The application for the writ of habeas corpus is denied.

"In chambers, this the 13th day of March, 1957.

Lloyd W. Davidson, Judge
K. K. Woodley, Judge"

2. Ex Parte *Alvaro Alcorta*—Concurring opinion dated March 13, 1957, denying writ of habeas corpus by the Court of Criminal Appeals of Texas:

"I agree that the conviction is not void but feel that petitioner's contention should be stated and discussed.

"Petitioner had been separated from his wife for ten months prior to the homicide.

"The witness Castilleja told Assistant District Attorney Barrera prior to the trial that he had five or six acts of intercourse with petitioner's wife after her separation from the petitioner and prior to the night of the homicide. Barrera advised Castilleja to tell the truth if he were questioned at the trial about such illicit relationship but not to volunteer any information unless he was asked.

"Barrera called Castilleja as a witness for the State, and, on direct examination, the following transpired:

"Q. Natividad (Castilleja), were you in love with Herlinda (petitioner's wife)?

A. No.

Q. Was she in love with you?

A. No.

Q. Had you ever talked about love?

A. No.

Q. Had you ever had any dates with her other than to take her home?

A. No. Well, just when I brought her from there.

Q. Just when you brought her from work?

A. Yes."

"It was not shown that any of the answers were untrue.

"Petitioner's contention is that, since Barrera knew about the acts of intercourse at the time he called Castilleja to testify, the questions propounded to him on direct examination as set forth above, together with Barrera's admonition to Castilleja not to volunteer any information while a witness unless specifically asked, were tantamount to the suppression of evidence, that Castilleja's testimony at the trial was perjury, all of which deprived the appellant of a trial in accordance with the rules of due process.

"Though not without difficulty, the writer has concluded that petitioner's contention cannot be sustained.

Morrison, Presiding Judge."

II. Jurisdiction

The jurisdiction of this Court is invoked under the 5th and 14th Amendments to the Constitution of the United States.

The decision sought to be reviewed is a denial by the Court of Criminal Appeals of Texas on March 13, 1957, of an application for a writ of habeas corpus, said application alleging that the conviction, verdict, sentence, and judgment, and a warrant for the execution of the death penalty in Cause No. S-54370, in Criminal District Court No. 2 of Bexar County, Texas, styled *The State of Texas* v. *Alvaro Alcorta*, are void and should be set aside and held for

naught because all the same was based on perjured testimony against Alvaro Alcorta, and the suppression of evidence in favor of Alvaro Alcorta, which evidence in both instances was vital and material to the issues of guilt and/or the punishment to be assessed by the jury.

That this cause involves a federal question raised in the state court by the filing of an application for a writ of habeas corpus after conviction, as provided under Article 119, Code of Criminal Procedure of Texas, in which your petitioner claimed that he was denied due process of law because of the perjury and suppression of evidence, as hereinabove alleged.

Statutes Involved:

Amendment V, Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or Naval forces, or in the Militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment XIV, Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1256, Penal Code of the State of Texas:

"Murder. Whoever shall voluntarily kill any person within this State shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing."

Article 1257, Penal Code of the State of Texas:

"Punishment for Murder. The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two."

Article 1257a, Penal Code of the State of Texas:

"Evidence. In all prosecutions for felonious homicide the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed. Provided, however, that in all convictions under this Act and where the punishment assessed by the jury does not exceed five years, the defendant shall have the benefits of the suspended sentence act."

Article 1257b, Penal Code of the State of Texas:

"Instructions. In all cases tried under the provisions of this Act, it shall be the duty of the court to define 'malice aforethought' and shall apply that term by appropriate charge to the facts in the case and shall instruct the jury that unless from all the facts and circumstances in evidence the jury believes the defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than five years; . . ."

Article 1257c, Penal Code of the State of Texas:

"Instructions on issue of murder without malice. In all cases tried under the provisions of this Act it shall be the duty of the Court, where the facts present the issue of murder without malice, to instruct the jury that murder without malice is a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection, . . ."

III. Questions Presented

Have the provisions of the 5th and 14th Amendments to the Constitution of the United States been violated, or has an accused been accorded a fair and impartial trial where:

a. The prosecutor advised and encouraged the only eye witness to the killing, who was also the state's main witness, to deny and not to admit nor volunteer facts favorable to the defendant which would have mitigated the punishment assessed by the jury?

b. The witness, after having received the foregoing advice from the prosecutor, committed perjury regarding matters vital and material to the issues of guilt and/or punishment to be assessed?

c. The prosecutor, before the trial had begun, received information vital and material to the issues of guilt and/or punishment, favorable to the defendant but unknown to the defendant at the time, and failed and refused to apprise the court, the defendant or his attorney of the same so that such evidence would not be available to the defendant, but instead, having advised the witness to deny such facts, the prosecutor proceeded to question the witness during the trial regarding these facts and, receiving answers known to him (the prosecutor) to be untrue, he sat mute and neither informed the court nor the defendant that the testimony of the witness was false, untrue, and perjured?

IV. Statement of the Case

On or about June 19, 1955, Alvaro Alcorta, a citizen of the State of Texas and of the United States of America, stabbed his wife, Herlinda Alcorta, to death shortly after he found her sitting in an automobile with one Natividad Castilleja at about 2:00 o'clock in the morning, in front of or near the home of her parents, where she was residing at the time.

On July 28, 1955, Alvaro Alcorta was indicted by a Bexar County, Texas, Grand Jury for the offense of Murder with Malice, said indictment being based on the killing of his wife, as above described.

On October 3, 1955, the defendant was tried in the Criminal District Court No. 2, of Bexar County, Texas, for the

aforementioned offense after entering a plea of "not guilty."

During the trial, a witness, Natividad Castilleja, who was seated in the car with the deceased immediately before she was stabbed to death, was called to the witness stand by the State of Texas and testified as follows regarding his relationship with the deceased (R. 142):

"Q. She's married. Now, other than the time you saw or met Herlinda Alcorta at your sister's house, did you ever see her on other occasions?

A. Well, I give her about two times, I give her a ride.

Q. You gave her a ride about two times?

A. Yes, sir.

Q. From where to where?

A. From where she was working to her house."

And again the following questions asked by the same assistant district attorney and the answers given by the witness Castilleja while still on direct examination by the State (R. 156):

"Q. Natividad, were you in love with Herlinda?

A. No.

Q. Was she in love with you?

A. No.

Q. Had you ever talked about love?

A. No.

Q. Had you ever had any dates with her other than to take her home?

A. No. Well, just when I brought her from there.

Q. Just when you brought her from work?

A. Yes."

After the State had rested its case, the defendant took the witness stand and testified that he and his wife had

been separated for some time; that she had neglected her children and had on many occasions left them alone and unattended while she was out with other men; that he had seen her at several night clubs dancing with men; that he had seen her on various occasions in automobiles with men; that he had seen her on several occasions at night clubs dancing with the witness, Natividad Castilleja; that just before the stabbing he saw her sitting in an automobile with Castilleja, kissing and embracing him; that all of these things so inflamed his mind and enraged him to the extent that he could not control his emotions and thereupon stabbed his wife many times with a pocket knife.

On November 5, 1955, the jury returned a verdict of guilty of the offense of Murder with Malice and assessed the death penalty as punishment.

On November 8, 1955, a motion for a new trial was filed in the trial court.

On November 12, 1955, said motion for a new trial was denied and notice of appeal to the Court of Criminal Appeals of Texas was given on that date.

On December 21, 1955, said appeal was filed in the Court of Criminal Appeals of Texas and was submitted on brief and argument on February 15, 1956.

On May 30, 1956, the judgment of the trial court was affirmed by the Court of Criminal Appeals of Texas.

On June 20, 1956, appellant's motion for a rehearing was argued and the same was overruled on October 3, 1956.

On October 17, 1956, a second motion for rehearing was submitted and the same was denied without written opinion on October 24, 1956.

On January 16, 1957, a hearing was had before the Board of Pardons and Paroles of Texas in an attempt to commute

from death in the electric chair to life imprisonment, and the same was denied on January 17, 1957.

On January 24, 1957, one Father Francis Duffy, a Catholic priest, Chaplain at the Texas State Prison at Huntsville, Texas, went to the home of Natividad Castilleja in San Antonio, Texas, and interviewed him regarding his testimony in the trial. Shortly thereafter, Father Duffy obtained from the witness a sworn affidavit to the effect that he, Castilleja, had not told the truth when he testified in the trial of Alvaro Aleorta. Further, Castilleja stated in the affidavit that he had been intimate with the deceased on many occasions; that he had given the prosecutor this information before the trial of the case, and was instructed and advised by the prosecutor not to admit nor volunteer this information, but to deny the same if he were asked. Further, that the reason he did not tell the truth in the trial regarding his relationship with the deceased was because of the instruction and advice given him by the prosecutor and, had it not been for this instruction and advice, he would have admitted his true relationship with the deceased.

On February 8, 1957, a subsequent hearing for commutation was had before the Board of Pardons and Paroles of Texas and the foregoing facts were presented to the Board, including the affidavit of Castilleja as aforementioned. The District Attorney of Bexar County, Texas, and his assistant, the prosecutor who tried the case, were present at this hearing and both admitted that they had been informed before the trial of the case by Natividad Castilleja of his true relationship with the deceased. The prosecutor who tried the case made the following statement, under oath, before the Board of Pardons and Paroles:

> "I told him (Castilleja) that he didn't have to tell it to the jury; yes, I told him it was not admissible unless

it was brought up as a defense. It had not been raised as a defense and, if it had been asked, I would have objected to it."

On February 8, 1957, the Board of Pardons and Paroles again refused to commute the sentence from death in the electric chair to life imprisonment.

On February 14, 1957, an application for a writ of habeas corpus was filed in the trial court, under Article 119, Code of Criminal Procedure of the State of Texas, wherein the above and foregoing facts regarding the suppression of evidence and perjury were set out, and it was alleged that the conviction, verdict, sentence and judgment were void for the reason that the defendant was denied rights guaranteed him under the 5th and 14th Amendments of the Constitution of the United States. A hearing was had on the above mentioned application for a writ of habeas corpus on February 21, 1957, in the Criminal District Court No. 2 of Bexar County, Texas. Evidence was heard and a Statement of Facts was compiled, and the application for the writ of habeas corpus was denied.

On February 22, 1957, an application for a writ of habeas corpus was filed in the Court of Criminal Appeals of Texas and a request was made that the court reporter of the Criminal District Court No. 2, Bexar County, Texas, be instructed to prepare a narration of the facts adduced in evidence in the hearing in that court, and that the same be transmitted to the Court of Criminal Appeals for its consideration. Said request for a narration of the facts was granted, and the same was prepared and transmitted to the Court of Criminal Appeals.

On March 6, 1957, a hearing was had before the Court of Criminal Appeals of Texas, in Cause No. 316—Application Docket, on the aforementioned application for writ of habeas corpus and arguments were heard by the court. On

March 13, 1957, the Court of Criminal Appeals of Texas entered an order denying the application for a writ of habeas corpus.

On March 18, 1957, a motion for rehearing was requested and it was subsequently denied by the Court of Criminal Appeals of Texas.

On April 5, 1957, a final plea for commutation of sentence was filed with the Board of Pardons and Paroles of Texas, and the same was overruled on the same date. Also, on the same date, the Board of Pardons and Paroles granted petitioner a stay of execution until June 4, 1957, in order to afford petitioner time to prepare and file a petition for writ of certiorari in the Supreme Court of the United States.

On May 27, 1957, this Honorable Court granted the writ of certiorari and ordered a stay of execution for petitioner.

V. ARGUMENT

Petitioner Is Being Deprived of His Life Without Due Process of Law in Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

It is contended that under Article 1257a, Penal Code of the State of Texas, petitioner had the right during his trial to relate to the jury all relevant facts and circumstances within his knowledge regarding the conduct of his deceased wife, in order to show the condition of his mind at the time of the homicide. Since he had this right under the said Article 1257a, it must be stated that he then had the further right to corrobbrate his own testimony regarding his condition of mind at the time of the homicide by any other witness who knew those facts to be true and was competent to testify regarding the same. Certainly he was entitled

to the benefit of the true and unperjured testimony of the witness, Natividad Castilleja, who, had he told the truth when he testified, would have more than corroborated petitioner in the testimony he gave when he took the witness stand in his own behalf. In support of this contention, petitioner cites the case of *Thompson* v. *The State of Texas*, 29 SW (2d) 343, and quotes the following statement of the court in that case:

> "That it was calculated to stir the passions of a father under the fact shown in this record is hardly open to controversy . . . If so he had the right to prove in every legitimate way the truth of the matters relied upon by him in mitigation of the punishment, and we think, under the issues present in this record, he was entitled to corroborate Hemphill by the testimony of Mrs. Buckly . . . and its exclusion was error."

It must be stated that the prosecutor, by his conduct in telling Castilleja to deny his true relationship with the deceased, deprived the petitioner of his legal right to corroborate his own testimony regarding his condition of mind at the time of the homicide. Whether the same was done wilfully or whether it was due to an honest mistake on the part of the prosecutor is of no consequence insofar as the effect it had on the jury and the verdict and punishment assessed by the jury. To say that this conduct and its effect did not seriously damage the petitioner is inconceivable. It should be observed that the damage was two-fold: First, it deprived the petitioner of his right to corroborate his own testimony and bolster his credibility as a witness in the eyes of the jury and, secondly, it cast serious doubt as to the truth of all his testimony.

The prosecutor seeks to excuse his conduct in advising the witness to deny his true relationship with the deceased on the theory that such testimony was not admissible unless

raised as a defense by the petitioner. The prosecutor, however, has overlooked the fact that it is the duty of the court and not the prosecution to pass on the admissibility of evidence. It must be observed at this point that little sincerity can be attributed to this excuse by the prosecutor for his conduct since the State had not rested its case at this point and the defendant had not yet testified, and the prosecutor had no right to assume at this stage of the trial what petitioner's defense might be. Assuming, only for the sake of arguiment, that the prosecutor's contention is correct and that such testimony was only admissible if raised by petitioner as a defense, then it is impossible to attribute any sincerity whatsoever to the prosecutor's contention in view of the fact that he, the prosecutor, raised the issue regarding Castilleja's relationship with the deceased before the State had rested, before the petitioner had testified, and before any defense whatsoever had been raised.

Only one conclusion can be arrived at in the light of the foregoing, and that is that the prosecutor, anticipating such testimony on the part of the petitioner, if and when he did testify, sought to weaken and discredit such testimony before it was ever given by the petitioner.

It is admitted that the direct question, "Did you ever have sexual intercourse with the wife of Alvaro Alcorta?" was never asked Castilleja by the prosecutor but to say that this question was not asked even more emphatically by the prosecutor is unthinkable in the light of the following testimony of Castilleja (R. 142):

"Questions by Mr. Barrera:

Q. She's married. Now, other than the time that you saw or met Herlinda at your sister's house, did you ever see her on other occasions?

A. Well, I gave her about two times, I give her a ride.

Q. You gave her a ride about two times?

A. Yes, sir.

Q. From where to where?

A. From where she was working to her house."

And, again, the following questions asked by the same assistant district attorney and the answers given by Castilleja while still on direct examination by the State (R. 156):

"Q. Natividad, were you in love with Herlinda?

A. No.

Q. Was she in love with you?

A. No.

Q. Had you ever talked about love?

A. No.

Q. Had you ever had any dates with her other than to take her home?

A. No. Well, just when I brought her from there.

Q. Just when you brought her from work?

A. Yes."

The foregoing testimony of Castilleja, when compared with his subsequent testimony in the hearing on petitioner's application for a writ of habeas corpus, after conviction, wherein he testified that he had on many occasions indulged in acts of sexual intercourse with the deceased, is contradictory and shows glaringly the injustice and damage done to the petitioner at the time he was tried. Castilleja testified at the aforesaid hearing as follows (R. 26, 27):

"Questions by Mr. Semaan:

Q. All right. Now, Natividad, why didn't you say in court, in the trial of Alvaro Alcorta, why didn't you tell about these acts of intercourse you had with her?

A. Why didn't I say it? Well, I wasn't asked.

Q. Is that your only reason?

A. Well, yes, because they told me not to volunteer. I wasn't going to volunteer anything they didn't ask me.

. . . . . .

Q. Had you not been told by Roy Barrera or Pete Torres that when you took the stand and testified against Alvaro Alcorta you did not have to volunteer that information about sexual relations with Herlinda Alcorta, would you have told about it?

A. Yes."

In the light of the prosecutor's testimony in the hearing on petitioner's application for a writ of habeas corpus, it can only be concluded that he maintained utter disregard for the rights of the petitioner during his trial, and cared little whether or not the petitioner was afforded a fair and impartial trial as guaranteed him under the 5th and 14th Amendments to the Constitution of the United States. The following excerpts taken from the testimony of the prosecutor clearly show his indifference, as above stated (R. 74, 75):

"Questions by Mr. Semaan:

Q. Would it not have been the honorable and honest thing to do, Mr. Barrera, if you wanted to see that this man had a fair and impartial trial, when you heard those answers, knowing that the man had had intercourse with her, to notify the Judge as to the true answers or the true facts?

A. Mr. Semaan, the honorable thing is never to approach the bench with the facts of a case, as I have often seen it done, and try to influence a judge one way or the other.

. . . . . .

Q. You never took it upon yourself; in spite of the fact that the occasion never arose, you never felt it was your duty or took it upon yourself to tell the judges about that, either before the trial or after the trial; either before this testimony was elicited or after it was elicited, did you, Mr. Barrera?

A. Not any more so than I felt it was my duty to tell him about the character of the defendant, Alvaro Alcorta, or not more than the misconduct of Alvaro Alcorta, knowing myself it was inadmissible to begin with. It is not out of the ordinary to instruct any witness not to volunteer any information and to answer only the questions asked of him truthfully.

* * * * *

Q. Did you ever take it upon yourself, Mr. Barrera, either before or after the trial, or before this testimony was elicited, this testimony I have just read to you and you have acknowledged, either before it was elicited or after it was elicited, did you ever take it upon yourself to, or feel a duty to inform the attorney for the defendant, Alcorta, of the true facts regarding the relationship between Herlinda Alcorta and Natividad Castilleja?

A. Not any more than I would feel there was a duty upon him to tell me what the defendant may have told him, or the true facts of the killing as it might have occurred as he knows it, no, sir."

The conduct of the assistant district attorney in suppressing vital and material evidence favorable to the petitioner, and his encouraging Castilleja to commit perjury, amounted to fundamental unfairness to the petitioner and violated his constitutional right. In support of this, petitioner cites the case of *United States ex rel. Thompson* v. *Dye*, 221 F.2d 763, and quotes the following statement of

Circuit Judge Hastie in his concurring opinion wherein he states:

> "It seems likely that many situations will arise in which a prosecutor can fairly keep to himself his knowledge of available testimony which he views as mistaken or false. But there are other circumstances in which a prosecutor must, or certainly should know that even testimony which he honestly disbelieves is of a type or from a source which in all probability would make it very persuasive to a fair minded jury. This is notably true of testimony of a police officer, and most certainly of an arresting officer, favorable to a contention of the accused person. Here the prosecutor not only kept quiet about the existence of such testimony but, as Judge McLaughlin points out, even stated in open court that other police officers if called 'would corroborate what already has been testified to.' Thus, the wrong of nondisclosure of obviously significant testimony was compounded by a misleading affirmative statement as to the nature of the available but unused testimony.
>
> "In brief, it is not every case in which the prosecution must reveal the availability of testimony inconsistent with the government's contentions. But in special circumstances such nondisclosure may, and here it certainly does, amount to fundamental unfairness in the trial of a criminal case."

It was the absolute and unequivocal duty of the assistant district attorney to bring the true relationship of the deceased and Castilleja to the attention of the jury. If he himself chose not to do this, it then became his legal and moral duty to apprise the court, the petitioner, or his attorney of this evidence once it was brought to his attention and permit them to use it, if they so desired. It was cer-

tainly not his duty, nor his right, to suppress such evidence and to tell Castilleja to deny it under any circumstances. In support of this contention, your petitioner quotes the following statement from the case of *United States ex rel. Almeida* v. *Baldi*, 195 F.2d 815:

> "In his concurring opinion in Commonwealth v. Neill, 362 Pa. 507, 520, 67 A.2d 276, 282, Mr. Chief Justice Maxey said: 'Of course, if he (the District Attorney) should discover some fact which would militate in defendant's favor it would be his moral and legal duty to bring this to the jury's attention * * *' See also Commonwealth v. Sarkis, 164 Pa. Super. 194, 199, 63 A.2d 360, 363, citing inter alia, Donaldson v. Commonwealth, 95 Pa. 21."

In the case of *United States ex rel. Montgomery* v. *Ragen*, 86 F. Supp. 382, District Judge Igoe, in his opinion, defines clearly the rights and duties of a prosecutor, as well as the rights of a defendant, as guaranteed him under the 14th Amendment to the Constitution of the United States. The following excerpts from his opinion may certainly be applied to this case:

> "A prosecutor is supposed to be an impartial representative of public justice. The methods employed by the prosecution at Lake County in 1924 represents as shocking a situation as ever before presented before this court. A society cannot suppress lawlessness by an accused through the means of lawlessness of the prosecution. A society cannot inspire respect for the law by withholding its protection from those accused of crimes. It was and is the prosecuting attorney's duty to assist in giving a fair trial to a defendant. Read v. United States, 8 Cir., 42 F.2d 636; Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314. A prosecutor must, to be fair, not only use the evi-

dence against the criminal, but must not willingly ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged. It is manifest in this matter that some one identified with the prosecution, as the circumstances indicate very clearly, ignored a material piece of evidence which, if it had been brought to the attention of the jury or the trial judge, would certainly have resulted in the acquittal of this relator. There is evidence in the record sufficiently to indicate that circumstantial vital evidence was brought to or available for the prosecution. The prosecution is charged with the knowledge of what was contained in the certificate of findings by Dr. John E. Walter. The respondent conceded the authenticity of the hospital record. Presenting the obverse, another Judge has said—'Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.' Hurd v. People, 25 Mich. 405.

"To condone the methods evident in this case, is to invite grave injustice. There is one way to stop a practice that has become altogether too common—and that is to bring it to a conscious level where the public can scrutinize it and take such steps as are necessary to insure a true rendition of justice to all, regardless of race, color or creed.

* * * * *

"The due process clause of the Fourteenth Amendment embraces the requirement that no trial should deprive a defendant of the constitutional safeguards which are of fundamental importance, and a necessary part of a 'fair trial.' The unjustified and illegal pun-

ishment of James Montgomery is a clear demonstration of violence to the American Concept of due process of law.

* * * * *

"Due process, in short, means fair play. Due process of law is that process of impartial law which is binding because it is right. It senses the mistakes of the past and wants to rectify them. It provides men with faith. As stated in People v. Bimbo, 314 Ill. 449, 454, 145 N.E. 651, 653. 'A defendant charged with crime has a right to a fair and impartial trial according to law, and the law does not *provide one method for trying innocent persons and another for trying guilty persons, as all persons charged with crime are presumed to be innocent until they are proven guilty beyond a reasonable doubt according to the established methods of procedure.*' People v. Gardiner, 303 Ill. 204, 135 N.E. 422; People v. Newman, 261 Ill. 11, 103 N.E. 589. The state's attorney is a sworn officer of the court, and it is his official duty to see that the defendant has such fair and impartial trial. While errors are sometimes committed by counsel through eagerness to win a lawsuit, yet there is nothing *in the duty of a state's attorney which requires him to prejudice the right of a defendant to a fair trial in an eagerness to secure a conviction.* People v. Sorrells, 293 Ill. 591, 127 N.E. 651. (Emphasis supplied.)"

The same thought is further expressed in the case of *Mooney* v. *Holohan*, cited in 98 ALR 406, wherein it is stated:

"... if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through deliberate deception of court and jury by the presentation of

testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of the defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the state, like that of an administrative officer in the execution of its laws, may constitute state action within the purview of the 14th Amendment. That amendment governs any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers. Carter v. Texas, 177 U.S. 422, 447; 44 L.Ed. 839, 841, 10 Sup. Ct. 687; Rogers v. Alabama, 192 U.S. 226, 231, 48 L.Ed. 417; 24 Sup. Ct. 257; Chicago B & Q Ry. v. Chicago, 166 U.S. 226, 233, 234, 41 L.Ed. 979, 983, 984, 17 Sup. Ct. 581."

That the prosecutor knew of several acts of intercourse between the deceased and Castilleja cannot be denied. That was admitted by the prosecutor himself, who, in the hearing on the application for writ of habeas corpus, in the Criminal District Court No. 2 of Bexar County, Texas, testified as follows (R. 77):

"Questions by Mr. Woods:

Q. Mr. Barrera, going back to the taking of the statement on July 20th, I believe, of 1955——

A. Yes, sir.

Q. —you were present and Mr. Torres was present and Natividad Castilleja was present?

A. That's correct.

Q. Just what did you tell Natividad Castilleja at the time and place?

A. The situation, as I recall, was this: Mr. Torres had been talking to Mr. Castilleja. He had the statement in writing already and asked me to go in there

and look at it before the witness signed it. At that time I went in. I read the statement. I asked Castilleja if the statements contained therein were true. He said yes. I had a conversation with Mr. Torres in private. I asked him whether or not he was asked if there was or was not any intercourse between Natividad and the deceased in this case. He said he wasn't too satisfied about that. We both then went back in and continued to ask him questions about prior acts of intercourse. He finally admitted he had had intercourse with Herlinda Alcorta on several occasions."

That the prosecution intended to suppress this evidence is manifest from the fact that the admission of the illicit relationship to the district attorney by Castilleja was not included in the written statement taken from him (Exhibit "E", R. 124). Had the district attorney intended to be fair with petitioner, and had he intended the jury to hear all the relevant facts and circumstances surrounding the homicide, this admission by Castilleja would have been included in his statement when it was taken by members of the district attorney's office. The fact that the same was omitted shows clearly the intention and attitude of the district attorney even at that stage of the case.

Further evidence that the relationship between Castilleja and the deceased, Herlinda Alcorta, was known to the district attorney is reflected in a letter from Roy R. Barrera, one of the prosecutors in the trial, to the Board of Pardons and Paroles, dated January 29, 1957 (Exhibit "A", R. 114). In said letter Barrera admits that this relationship was known to him and to other members of the district attorney's office before the trial. Accordingly, it is inconceivable how the prosecutor can deny the fact that the petitioner was denied a fair trial and that his rights guaranteed him by the 5th and 14th Amendments to the Constitution of the United States were not violated.

Further evidence that the prosecutor was fully aware that Castilleja was committing perjury when he testified as he did in the trial of the case is reflected in the testimony of Stewart Long, a newspaper reporter assigned to cover the hearing before the Board of Pardons and Paroles of Texas after the conviction. Mr. Long, while testifying in the hearing on the application for a writ of habeas corpus, testified as follows regarding a statement he heard the prosecutor make, under oath, to the Board of Pardons and Paroles of Texas (R. 82, 83):

"Questions by Mr. Semaan:

Q. You are the witness who testified, regarding this hearing at the Board of Pardons and Paroles on February 8th, that it was you who transmitted that story to the San Antonio Light?

A. Yes.

Q. And that you were present when Roy Barrera made the statement before the Board?

A. Yes.

Q. What did you hear Mr. Barrera say?

A. Just what he said, or do you want the question that was asked?

Q. Give us any background you want, but bear in mind I'm speaking of the point where he stood up and said, 'I'll take the blame for that,' or words to that effect.

A. Mr. Green was being questioned about his policies with regard to his investigator's interview with witnesses, and Mr. Barrera stood up and said, 'I was at those interviews between the investigator and Natividad.'—

Q. Castilleja?

A. —'Castilleja, and I'm responsible for the alleged subornation of perjury.' Whereupon, Attorney Garcia

put Mr. Barrera on the stand and asked him the question as to whether he told the witness, Castilleja, that he did not have to testify concerning sexual relations with Mrs. Alcorta, and he said, 'Yes.'

Q. Who said yes?

A. Mr. Barrera said yes, that it was not admissible unless it was raised as a defense, and that had it been raised, he would have objected in the court."

The same testimony, almost word for word, was given by Harry Van Slycke (R. 84-90), who followed Stewart Long on the witness stand in the hearing on the application for a writ of habeas corpus.

In view of all the foregoing, the following conclusions are evident:

1. That the witness, Natividad Castilleja, and the deceased, Herlinda Alcorta, indulged in acts of sexual intercourse on many occasions during a period of two months prior to the homicide.

2. That the witness, Natividad Castilleja, informed the prosecutor and other members of the district attorney's staff of his relationship with the deceased before the case was tried.

3. That the prosecutor had knowledge of the relationship that had existed between the witness, Natividad Castilleja, and the deceased, Herlinda Alcorta, before the trial.

4. That the prosecutor advised and instructed the witness, Natividad Castilleja, before the trial to deny any acts of sexual intercourse with the deceased, Herlinda Alcorta, when he took the witness stand to testify.

5. That during the trial, the witness, Natividad Castilleja, committed perjury when he testified regarding his relationship with the deceased.

6. That the prosecutor who called Natividad Castilleja to the witness stand heard his testimony and, knowing that the same was false, sat mute and neither notified the court nor the defendant's attorney that the testimony of the witness Castilleja was not true.

It may be argued that the evidence suppressed was not vital nor material to any issue, therefore no harm was done the petitioner, and that the conviction should stand. How this can be argued in good conscience is beyond comprehension. There is no question that, because of the suppressed evidence and the perjury committed by Castilleja, the jury was given an untrue and distorted picture of the actual facts in this case. The jury was led to believe that the petitioner, without just cause or provocation, and without any mitigating circumstances, killed and murdered an innocent and well-behaved wife and mother; when, in truth and in fact, the petitioner, in a fit of temper and while becoming so enraged at the sight of his wife in another man's arms, lost control of his emotions and stabbed his wife to death; not an innocent and well-behaved wife and mother but a woman who disregarded her duties and obligation to her husband and children; a woman devoid of all morals, who taunted and harassed her husband by her conduct with other men until he was no longer able to control his emotions (R. 157-189).

That no man should be deprived of his life without due process of law is elemental. No matter how trivial the offense, no man should be convicted and punished unless a full, complete, and honest picture of the entire situation is given the jury. Under no circumstances should a man be deprived of his life or his liberty where evidence which might mitigate his punishment or prove his innocence is wilfully suppressed by the prosecution nor where perjury is encouraged and condoned by the prosecution. This

thought is magnificently expressed by Circuit Judge Edgerton in the case of *Griffin* v. *United States*, 183 F. 2d 990, wherein he states:

> "It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion that evidence of the concealed knife was inadmissible was a reasonable opinion, which the District Court sustained and no court has overruled until today. However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314.'
>
> "The order of the District Court is reversed and the case remanded with instructions to grant a new trial.
>
> "Reversed and remanded."

Reference is made to Articles 1256, 1257, 1257a, 1257b and 1257c of the Penal Code of the State of Texas. In the light of the foregoing facts and circumstances of this case, can it not be said that had the jury heard the true facts from Castilleja regarding his relationship with the deceased, they would have found the petitioner guilty of nothing more than "murder without malice," and could not then have assessed petitioner's punishment in the State Prison of Texas for a period of more than five years.

In its brief filed in opposition to the petition for writ of certiorari, Respondent attempts to attach importance to the fact that although Castilleja had sexual intercourse with the deceased on many occasions he did not have intercourse with her on the night of the killing. Petitioner maintains that Castilleja and the deceased did have intercourse just before the homicide and calls this court's attention to Exhibit "B" (R. 119), wherein Castilleja admits that he had sexual relations with the deceased on many occasions and also just before the killing. (See also testimony of Fred A. Semaan, R. 91-97.) From all the facts and circumstances regarding the relationship of Castilleja and the deceased, coupled with his admission as reflected in the aforementioned Exhibit "B", there should be no doubt or question regarding his relationship with the deceased on the night of the killing. However, whether he did or did not have sexual relations with the deceased just before the killing does not in any way alter the fact that evidence favorable to the petitioner was suppressed during his trial and that Castilleja committed perjury at the suggestion of the prosecution.

Also in its aforementioned brief in opposition, Respondent goes to great lengths to leave the impression with this court that the conduct of the deceased wife of the petitioner was not known to him at the time he stabbed her to death; that petitioner not knowing about her relationship with Castilleja, or other men, testimony regarding such relationship between the deceased and Castilleja or other men would not be admissible; and that the suppression of such evidence by the prosecutor was not harmful to the petitioner since it was not admissible evidence in the first place. Respondent seems to ignore completely the fact that, whether such evidence was admissible or not, the matter of the deceased's relationship with Castilleja was first raised by the prosecution before the State of Texas had rested its

...se. An examination of the testimony of Natividad Castilleja at the trial (R. 140-157) will unequivocally show that this matter was first opened by the State of Texas when it called Castilleja to the stand before the State had rested, and before the petitioner had presented any witnesses or uttered one word in his defense of the case.

Further, and even more important, Respondent completely disregards the testimony of the petitioner in the trial of the case when it attempts to lead this court to believe that petitioner was not entitled to the true and unperjured testimony of Castilleja regarding his relationship with the deceased. Respondent in its brief in opposition goes to great lengths to make it appear that this relationship, not being known at the time of the homicide to petitioner, was not admissible in evidence and cites many cases in support of this contention. Petitioner states that this statement by the Respondent is not supported by the testimony adduced in the trial of the case. Such assumption is baseless and is contrary to the testimony of petitioner during the trial. Beyond the shadow of a doubt, the following excerpts from the testimony of petitioner during the trial show clearly that he was aware of his wife's conduct and relationship with the witness Castilleja, and with other men; that he had suspected such relationship for some time before the homicide; and that such suspicions being confirmed by seeing his wife kissing and embracing Castilleja, he lost control of himself and in a rage of uncontrollable passion stabbed his wife to death. Under Texas law this would be "murder without malice" and the punishment would be confinement in the state penitentiary for a period not to exceed five years. Petitioner relies not only on the following excerpts taken from his testimony in the trial but sincerely suggests a close examination of all his testimony during the trial, as well as the testimony of Castilleja during the trial and a comparison of that with the testi-

mony of Castilleja as adduced in the hearing on the application for writ of habeas corpus:

DIRECT EXAMINATION OF DEFENDANT

(R. 160-163)

"Questions by Mr. Lipscomb:

Q. (Mr. Lipscomb continuing:) On this occasion that they have testified about, the last night that you saw your wife, just what happened? When did you first look for your wife on that night?

A. On that night?

Q. Yes.

A. Well, like the testimony was here awhile ago, that they said that I was drinking with them and all that, why, yes, I was drinking with them. I know that Esperanza but I don't know the other girl. I went over there to that restaurant to see my wife at that time and I went over there with this girl because we bought her a present and I wanted to take it to her to the restaurant where she was working; and, at the same time, I wanted to see her and I took the present over there to give it to her. She refuses; all right. *The night before that I have seen her with another man in a car and he was—she was waiting outside of the restaurant there.* This other woman too, the testimony was given, that was given here that she never saw my wife going out with another man at the same place. I saw that with my own eyes one day before that; and that's why I told her, 'How about last night,' . . . From there, I went to see my wife, but I didn't see my wife alone or in the house or getting in from work or anything like that. *She was with another man in a car. Although he was here and saying it was the only time he have seen her, I have seen him several times in the Radio Club danc-*

ing and she was with that same fellow, and not only with that same fellow but with many others that I don't know the names of. That's when I saw her there in that place; and I didn't really have the intentions that, like Mr. Roy Barrera's got in the statement that I have decided to kill her right there. I didn't have those intentions; I only went to the car and this guy started, well, getting mad and all of that. Well, I never did carry a knife either because I had turned my job in, and I was going away. I never did carry a knife myself, I mean in my pocket. I was going, when I turned my job in, to leave because I didn't want nothing to do with her at least.

• • • • •

Q. And when you saw Castilleja in the automobile with your wife, what did he do?

A. Well, ~~he~~ start kicking me for one thing; and my wife was sitting down and they were kissing; I was looking at them from the rear, from the rear window.

Q. Speak slowly so we can understand.

A. *When I was getting to the car, when I turned the corner, I saw my wife was kissing with this fellow here; I didn't know him then. I just saw him dancing at the Radio Club up here. She had so many that I don't remember their names;* I wouldn't be asking for that, I just saw her, that's all. And I saw them, they were kissing; and I thought they were having a date-up or something; she had the door open, yes. But I had a feeling that something else was going to happen then, not only that they were kissing and all of that but something else. If I had had a camera and waited a little longer, it would have been a different story than what they claim up here.

Q. Well, when Castilleja was in the car with your

wife and you had a knife in your hand, did Castilleja start in your direction?

A. Yes, sir, he started kicking and, well, that was before. When I got to the car, he started the car; my wife said something to him that I heard like, 'My husband is coming.' She knew it; she didn't saw me or anything like that but she heard me while I was walking on the gravel. I had those thick-soled shoes and, when I was walking in the gravel, she knew that it was me. I was getting near the car.

Q. What did Castilleja do when he saw you?

A. When he got in the car, why, I was getting near to the car and she was going to close the door and he started the car; but I hold the door and jump on the running board. That's when the car started zig-zagging. Well, I was trying to get ahold of it myself [illegible] at the same time, stab my wife. I stab her I don't know how many times, I was so mad.

• • • • •

Q. What did he do then?

A. Well, I ran after Castilleja and he took off; and, then, I ran back and jump over my wife and took the wheel and took off (snapping fingers), although I didn't know where I was going or what I was going to do. If I would have been in my senses, I would have turned myself in right there, but I didn't know what I was doing.

CROSS-EXAMINATION

(R. 168)

Questions by Mr. Barrera:

Q. Well, you said you wanted to turn yourself in and that's why you came back to town. I just wanted to

know if the San Antonio Police Department or the Sheriff's office was out towards Boerne.

A. I didn't say I wanted to turn myself in; I said I came back to be punished.

Q. Well, who did you expect was going to punish you?

A. According to the law.

Q. And you expect to be punished, don't you?

A. Sure I am.

Q. You have done very wrong, haven't you?

A. Sure I have.

Q. And you should be punished?

A. Sure.

Q. And you know that?

A. I don't have no witnesses here or nothing and they don't let them talk or anything. Why can't I get a witness up here in my behalf? It is even in the Constitution of the United States that I be defended that way.

Q. Alvaro, what other witnesses were there when you stabbed your wife to death?

A. They only talk a few words and that is all there is to it.

Q. What other witnesses were there when you stabbed your wife?

A. Other witnesses?

Q. Yes.

A. There was only the driver of the car.

Q. Well, he was here, wasn't he?

A. Who, the guy that was driving?

Q. Castilleja?

A. Yes.

Q. He was here?

A. Yes he was here.

Q. Now, you spoke about your wife and your troubles and your intentions to Esperanza Huron, didn't you?

A. Yes, but they are all lies; you advise them before they came here in court.

• • • • •

(R. 170-171)

Q. Now, Alvaro, with reference to your confession here, isn't it a fact that, after you read it, Alvaro, you made any number of corrections on this statement?

A. Well, you told me to put some signatures there, but I don't know what they mean or what they put them for; you told me to put some corrections there, my initials; you told me that, I remember that.

Q. You remember I told you——

A. I don't know what the meaning of the words was that was going there; I don't know what you figure it out.

Q. You don't understand English?

A. Yes, I do.

Q. Do you read English?

A. Maybe you made a mistake on a number of things there.

Q. I did make a mistake every once in awhile and you corrected it?

A. Or maybe it wasn't the way you wanted it.

Q. You corrected it and you put your initials by the corrections, didn't you?

A. Yes; that's the only truth you said when you read it to the jury, that's the only piece of truth you said when I signed my statement there. The rest is nothing but a frame-up, that's all it is.

• • • • •

(R. 174)

Q. Did you intend to stab her, Alvaro?

A. Yes, I did; yes.

Q. Any number of times you intended to stab her and stab her and stab her?

A. I stab her; I mean I was just all carried away when I saw her with that guy and all of that. I was drunk; you get a man like that to think of everything like that, you get carried away and mad.

Q. Tell the jury. You didn't see your wife kissing that man, did you?

A. I did saw her, in the front there. You know what, why I came back?

Q. Alvaro, did you tell me that at any time during the time that we all talked to you? When Mr. Torres was taking that confession, did you tell anybody that?

A. What?

Q. That you saw your wife kissing Castilleja.

A. No; you weren't going to put it in there.

Q. Did you tell us that?

A. No, I didn't told you; you didn't ask me, and I knew if I tell you, why, you won't put it there anyway.

. . . . . .

(R. 177, 178)

Q. And isn't it a fact that you made corrections where you wanted to make corrections and initialed the corrections?

A. You didn't ask me to make any corrections; you could erase them back; part of them you had it in shorthand.

Q. Who put these initials on these pages?

A. Well, I did.

Q. Were those corrections you made?

A. (No response.)

Q. Isn't that right?

A. No.

Q. They were not?

A. I put my name there and I read it; but, you see,

I was only thinking about one-fourth of every page is what I was thinking about. I wasn't in my senses.

Q. You weren't in your senses?

A. No.

Q. Now, you did take the officers out to all of these places that you had been to, isn't that right?

A. What?

Q. You did take the officers out to all of these places that you had been to, where you threw your wife down by the creek?

A. Well, I told them I didn't even know; you showed me.

Q. Did you see the——

A. I didn't know where I threw her or anything; you show me the way.

Q. Did you see the bloody handprint you left there on the creek abutment? Did you see that?

A. What, the bloody hand?

Q. Yes.

A. That mark, well, I probably done it; I ain't denying it.

Q. I see. Well, then, that is true?

A. You told me which way I went when I left the car.

Q. This is true that——

A. You was the one that showed me that.

• • • • •

Q. You also said: 'I know that I have done wrong, and I must be punished for it and no one has said anything to me about punishment. I killed my wife because I wanted to and——'

A. No.

Q. '—I have here confessed to the killing.' Did you tell me that, Alvaro?

A. Not that I wanted to kill her; I had no idea she was with a man over there. I just wanted to see my

kids because I had turned in my job and I was going to take off. That's all I wanted.

. . . . . .

(R. 180)

Q. And where were you going, Alvaro?

A. Well, I just wanted to leave town, that's all.

Q. Where were you going?

A. Just north, any place.

Q. North or south?

A. I didn't want no part of it, just like it happened.

Q. And, at the time this happened, it is a fact that you already had your suitcase in a saloon down here packed?

A. Yes, I had my suitcase packed, but I wanted to see my kids before leaving. Instead of seeing my kids, I saw my wife kissing another man.

Q. At 1 o'clock in the morning?

A. At 1 o'clock; she was in the car with that man, kissing in the car. I caught her with a man and everything.

. . . . . .

(R. 184)

Q. I know. Well, that's why you killed your wife, isn't it?

A. Like I told you, if I had had a camera and waited a little longer, it would have been a different story; I would have brought the picture and showed it to you.

. . . . . .

(R. 186, 187)

Q. Isn't it a fact that Dominga told you, 'You had better not do anything to your wife; if she doesn't love you or you don't love her, you had better leave her alone'?

A. Well, no.

Q. She told you that, didn't she?

A. Not to me, Dominga.

Q. Not to you. Who did she tell it to?

A. I didn't tell it to nobody; that is something that is just made up, that's all. How come, when they come here, they say about going to Mexico and all of that stuff? I never said a word about that.

Q. You mean Dominga made it up?

A. You did; you got everything framed up here, that's all.

Q. And did Esperanza make her testimony up?

A. Well, her testimony, part of it is right and part of it is just a lie, that's all.

REDIRECT EXAMINATION

(R. 188)

Questions by Mr. Lipscomb:

Q. I didn't understand about Castilleja and your wife. Was she kissing him or he was kissing her that last time you saw them together?

A. Well, I don't know exactly which way it was; but they were kissing, that's all. I saw them through the shade of the light from when a car was coming on the opposite direction.

Q. You saw them kissing in the car?

A. Yes, sir."

Respondent attempts to make great issue regarding the testimony of Castilleja in the hearing on the application for a writ of habeas corpus, and in several places in the brief filed in opposition to the petition for writ of certiorari alleges that Castilleja repudiated his statement regarding his relationship with the deceased. Petitioner would show that such is not true and nowhere in the

Statement of Facts in the hearing on the application for writ of habeas corpus is there grounds for such a statement. Petitioner again invites a close inspection of the Statement of Facts in the application for a writ of habeas corpus and is willing to rest his whole case on this Court's interpretation of those facts. Assuming, only for the sake of argument, but absolutely not admitting that the witness Castilleja repudiated his testimony regarding his conduct with the deceased, petitioner says that the testimony of the prosecutor, Roy Barrera, alone is sufficient to prove perjury, subornation of perjury, and the suppression of evidence. In support of this, petitioner makes reference to the testimony of Roy Barrera when he was called to the stand in the hearing on the application for a writ of habeas corpus, both on direct and cross-examination (R. 71-82). Further, reference is made to the testimony of Stewart Long in the hearing on the application for writ of habeas corpus (R. 82, 83), wherein he recites a statement he heard made under oath by Roy Barrera before the Board of Pardons and Paroles of Texas. Petitioner contends that this testimony alone without one word from the witness Castilleja is proof beyond the shadow of a doubt of perjury, subornation of perjury, and the suppression of evidence.

Throughout Respondent's brief it is stated that Castilleja, in the hearing on the application for writ of habeas corpus, testified that he had not committed perjury. Petitioner says that this is a mere opinion of the witness, not supported by the facts, and again invites a reading of his testimony both in the trial (R. 140-157) and in the hearing on the application for writ of habeas corpus (R. 1-71). A comparison of his testimony in these two hearings can lead to only one logical conclusion, and that is that the witness Castilleja either lied during the trial or in the hearing on the application for a writ of habeas corpus. He could not possibly have been telling the truth in both instances.

Respondent, throughout his brief in opposition, refers to Castilleja as "petitioner's own witness" and states that petitioner called him to the witness stand and then sought to impeach him. Respondent seems to overlook the fact that Castilleja was the State's main witness during petitioner's trial, and was only called to the witness stand by petitioner in the hearing on the application for a writ of habeas corpus; that he was at that time an adverse, hostile, and unfriendly witness, and petitioner, under all rules of evidence, was entitled to impeach him even though he was placed on the witness stand by petitioner.

Respondent in his brief in opposition further states that "The Petitioner was unable to substantiate by any affirmative evidence that perjury had been committed by the witness Castilleja, or that there was any suppression of evidence by the prosecuting authority." Petitioner therefore invites again a close examination of the testimony of Castilleja, both in the trial and in the hearing on the application for a writ of habeas corpus, as well as the testimony of Roy Barrera, Stewart Long, and Harry Van Slycke in the hearing on the application for a writ of habeas corpus.

Petitioner states that evidence regarding the relationship of his wife and Castilleja was relevant and material, and that it was admissible for many reasons, especially to show the state of mind of the petitioner at the time of the homicide. Petitioner makes reference here to the applicable statutes of the State of Texas heretofore set out. Petitioner again states that if Respondent is sincere in his contention that the same was not admissible, and that the jury should not have heard the same because such facts were not known to petitioner at the time of the homicide, then the State of Texas should never, under any circumstances, have invited attention to and gone into the matter while putting on its main case before the State had rested,

and before the petitioner had put on any testimony of any kind or nature whatsoever. An examination of the Statement of Facts in the trial will show clearly that the State of Texas first raised the issue and adduced testimony regarding the relationship of the witness Castilleja and the deceased wife of petitioner. Having been informed by Castilleja before the trial of his true relationship with the deceased, the State of Texas was legally and morally bound, in fairness to the petitioner, to see that the jury was given the true facts. The State of Texas under no circumstances should have permitted the untrue testimony of Castilleja to stand and be received by the jury as true testimony. It was the legal burden and moral duty of the prosecutor, when he heard this testimony, knowing that it was not true, to inform the Court or the petitioner's attorney, or both, of the true facts so that petitioner would have been afforded the kind of fair and impartial trial guaranteed him by the Constitution of the United States of America.

Respondent makes great issue of the fact that petitioner's application for a writ of habeas corpus was denied by the Court of Criminal Appeals of Texas. Respondent ignores the fact that the laws of the State of Texas make no provision for a writ of error *coram nobis*. In view of the foregoing, it can be argued that the Court of Criminal Appeals of Texas denied petitioner's application for a writ of habeas corpus, not because petitioner's application was without merit nor because the allegations set out in his application for a writ of habeas corpus were not supported by the facts adduced in the hearing, but because under the laws of the State of Texas, as they now exist, no provision exists for relief in a situation such as presently confronts petitioner.

In conclusion, petitioner contends that all the above and foregoing amounted to a violation of the due process clause

of the Fourteenth Amendment of the Federal Constitution and cites, in support thereof, the recent case of *Bales* v. *Lainson,* 244 F. 2d 495, wherein the court, among other things, stated as follows:

> "Establishedly, a knowing use of perjured testimony by a state prosecutor, as the means or part of the means of convicting an accused, constitutes, if conviction occurs, a violation of the due process clause of the Fourteenth Amendment against him. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; White v. Ragen, 324 U.S. 760, 764, 65 S.Ct. 978, 980, 89 L.Ed. 1348."

VI. Conclusion

In view of the foregoing, petitioner respectfully submits that rights guaranteed him under the Fifth and Fourteenth Amendments of the Constitution of the United States have been violated and that the same amounted to a denial of due process of law.

WHEREFORE, petitioner prays that the judgment, verdict, and sentence in Cause No. S-54, 370 in the Criminal District Court No. 2 of Bexar County, Texas, styled *The State of Texas* v. *Alvaro Alcorta,* be set aside and held for naught and that petitioner be granted a new trial in said cause.

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OCT 18 1957

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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1957

No. 139

ALVARO ALCORTA,
Petitioner

vs.

THE STATE OF TEXAS
Respondent

On writ of certiorari to the Court of Criminal Appeals of the State of Texas

BRIEF FOR RESPONDENT

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SUBJECT INDEX

	Page
Statutes Involved	1
Questions Presented	3
Statement of the Case	4
Summary of the Argument	7
Argument	13
I. Texas has adequate corrective process	13
II. Petitioner has failed to prove allegations	16
III. Factual determination of State Court	32
IV. Evidence was not admissible	35
V. Federal cases cited by Petitioner, distinguished	45
VI. Cautioning of witness to answer questions	53
VII. Petitioner had equal opportunity to discover facts	55
Conclusion	59

INDEX OF AUTHORITIES

Constitution: Page

Amendment XIV, Constitution of the United States 12, 51, 54

Statutes:

Article 119, Texas Code of Criminal Procedure 1, 14

Article 134, Texas Code of Criminal Procedure 2, 14

Articles 245-266, Texas Code of Criminal Procedure 56

Article 1257a, Texas Penal Code 43

Article 302, Texas Penal Code 17

Article 303, Texas Penal Code 17

Texts:

McCormick and Ray—"Texas Law of Evidence" Section 688 26

44 Texas Jurisprudence—"Witnesses", Section 126 54

3 Wigmore, Evidence, Section 1018 26

Cases:

Anderson Nat'l Bank v. Luckett, 321 U. S. 233 64 S. Ct. 599 53

Bales v. Lainson, 244 Fed. 2d 495 50

Black v. State, 198 S. W. 959 (Tex. Crim. App.) 41

Bridges v. Wixon, 326 U. S. 135, 150 26

Childress v. State, 202 S. W. 2d 930 (Tex. Crim. App.) 44

Fay v. People of New York, 332 U. S. 261, 67 S. Ct. 1613 ..... 10, 33, 51

Fay Roofing Co. v. Wood, 344 U. S. 157, 735 S. Ct. 204 34

Gallegos v. Nebraska, 342 U. S. 55, 72 S. Ct. 141 ..... 10, 17, 33, 36, 52

Griffin v. United States, 336 U. S. 704, 709, 69 S. Ct. 814 ..... 12, 36

Griffin v. United States, 183 Fed. 2d 990 ..... 50, 52

Page

Hall v. State, 158 S. W. 272 (Tex. Crim. App.) 36

Howard v. State, 55 S. W. 2d 1048 (Tex. Crim. App.) 44

King v. State, 286 S. W. 231 (Tex. Crim. App.) 36, 39

Lacy v. State, 128 S. W. 2d 1165 (Tex. Crim. App.) 36, 39

Lisenba v. People of California, 314 U. S. 219, 62 S. Ct. 280 ..... 13, 16, 58

Lovett v. State, 223 S. W. 210 (Tex. Crim. App.) 11, 36, 38, 41

McCune, Ex parte, 246 S. W. 2d 171 (Tex. Crim. App.) 8, 14

Meyer v. State, 41 S. W. 632 (Tex. Crim. App.) 36

Mooney v. Holohan, 294 U. S. 103; 55 S. Ct. 340 45

Mooney, Ex parte, 73 P. 2d 554, 570 ..... 17, 46

Newchurch v. State, 121 S. W. 2d 998, (Tex. Crim. App.) 36, 39

Perea v. State, 227 S. W. 305 (Tex. Crim. App.) 36, 38

Phillips v. State, 2 S. W. 601 (Tex. Crim. App.) 11, 40

Scott v. State, 20 S. W. 2d 426 (Tex. Crim. App.) 44

Scott v. State, 190 S. W. 2d 828 (Tex. Crim. App.) 44

Thompson v. State, 29 S. W. 2d 343 (Tex. Crim. App.) 42

United States Ex Rel Montgomery v. Ragen, 86 Fed. Sup. 382 ..... 11, 49, 55

United States Ex Rel Almeida v. Baldi, 195 Fed. 2d 815 ..... 11, 47, 55

United States Ex Rel Thompson v. Dye, 221 Fed. 2d 763 ..... 11, 46, 55

Weige v. State, 196 S. W. 524 (Tex. Crim. App.) 36, 37

Wheeler v. State, 239 S. W. 2d 105 (Tex. Crim. App.) .. 43

Young v. State, 127 S. W. 1058 (Tex. Crim. App.) 36, 37

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On writ of certiorari to the Court of Criminal Appeals of the State of Texas

---

BRIEF FOR RESPONDENT

STATUTES INVOLVED

IN ADDITION TO THOSE CITED BY PETITIONER:

Art. 119, Texas Code of Criminal Procedure

". . . After final conviction in any felony case the writ must be made returnable to the Court of Criminal Appeals of Texas at Austin, Texas. The writ may issue upon the order of any district judge, and said judge may upon presentation to him of a petition for said writ, set the same down for a hearing as to whether the writ should issue, and ascertain the facts, which facts shall be transmitted to the Court of Criminal Appeals with the return of the writ if same is issued after such hearing. Provided further,

tensively in this petitioner's brief. However, it has no application whatsoever to the facts in this case.

The cited case of *Bales vs. Lainson*, 244 Fed. 2d 495 has no application here. It simply reverses the District Court for failing to grant petitoner a hearing upon his allegations, holding such allegations of perjury, knowingly used by the prosecutor, to be sufficient. The Court said, at page 496:

> ". . . The petition and response stood nakedly before the trial court as an allegation and a denial that perjured testimony had been knowingly used by the prosecuting attorney to convict appellant and so *presented facially a question of controverted fact.*"

In the instant case petitioner was not denied a hearing, but given full opportunity to prove his allegations, and the full record is before this Court with express findings by the Court against petitioner's contentions.

The case of *Griffin vs. United States*, 183 Fed. 2d 990, is a case in which prosecuting authorities knowingly withheld evidence that deceased had an open knife in his pocket; the defendant having pleaded self defense, uncommunicated threats and an attack upon him by the deceased at the time of the homicide. It was a federal prosecution from the District of Columbia, and the Supreme Court had remanded the case to the Circuit Court for the decision of the substantive question of the admissibility of such evidence. The Circuit Court, overruling a previous holding, held, with one dissent, that the evidence was ad-

missible. It then reversed the District Court, and remanded with instructions to grant a new trial. It should, therefore, be noted at the outset that procedurally, the case concerned the defendant's *motion for new trial on the grounds of newly discovered evidence*, and did not touch upon the question of State deprival of due process under the 14th Amendment rendering a conviction void. Therefore, Judge Edgerton's dicta, cited in petitioner's brief, p. 27, concerning the duties of the prosecution should be read in the light of the fact that he was speaking of a Federal prosecution, by a Federal prosecutor, and of a conviction over which the court still retained appellate and supervisory jurisdiction. Only the subject of federal prosecutions could be involved, and it was not a case where the Court had to find the conviction to be *void* on a constitutionl ground in order to grant relief. The Judge might well suggest a policy, having full supervisory control over the prosecution. This is not to say, however, that he has set out a precise and binding rule for all State prosecutions, the violation of which will void a State judgment under the Fourteenth Amendment.

The Supreme Court has so stated in the case of *Fay vs. People of New York*, 332 U. S. 261, 67 S. Ct. 1613. This Court took occasion to distinguish the rules and policies prevailing in federal prosecutions, and found such cases inapplicable to State prosecutions. The Court held, referring to such federal decisions:

> ". . . but those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice.

> They dealt only with juries in federal Courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in State Courts, and *these expressions of policy are not necessarily embodied in the concept of due process.*"

To the same effect is *Gallegos v. Nebraska*, supra.

The above federal cases are therefore distinguishable on their facts, many involving as they do extreme examples of deliberate fraud, deception of the court, and conduct by the prosecution which was the equivalent of perjury. There is no good reason to apply such holding to the facts of this case, where the strongest element is simply the prosecutor's failure to disclose inadmissible facts, not material to petitioner's defense.

At the very most, Judge Edgerton says that, "when there is *substantial room for doubt*, the prosecution is not to decide for the Court what is admissible or for the defense what is useful."

Certainly, under the State authorities heretofore cited, there was no "substantial room for doubt" as to the admissibility of the evidence. The prosecutor under such authorities, believed that it had no material value in the trial, and had the same opinion after the defendant had concluded his defense.

Certainly the *Griffin* case, including the dissenting opinion, has no application to evidence, not exclusively within the knowledge of the prosecution, but equally available to the defendant, and which was inadmissible under local law.

VI

To Caution a Witness To Answer Only The Questions Asked, But Not To Volunteer Uncalled For Information Is Not Fundamental Unfairness Under The Constitution

The facts in the case at bar certainly fall far short of those set before the Courts in the above cited cases. Here, there was no perjury by the witness or subornation of perjury; there was no deliberate suppression of material evidence by State authorities; there was no fraud perpetrated so as to mislead the Court or counsel. Rather, this case as in many, many other civil and criminal cases, involves simply the usual caution given to a witness that he must in all events tell the truth when he testifies, but in response to specific questions, and not to volunteer evidence which is not called for by the question. This Court well knows it is not only the common practice, but good practice for attorneys to so caution their witnesses, a practice followed by any practitioner experienced in trial work.

> "The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for 'Not lightly vacated is the verdict of quiescent years' ". *Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 64 S. Ct. 599.

It is rudimentary that trial testimony is conducted on a question and answer basis.

> "Answers should be responsive to the question asked, and witnesses are not permitted to

make to the jury *voluntary ex parte statements that are not in response to any questions*, as to facts which are inadmissible." *44 Tex. Juris "Witnesses", Sec. 126.*

Voluntary and unresponsive answers are not permitted, so it is quite proper to so caution a witness. Therefore, it is difficult to see how such a universal, entirely necessary, and legitimate pre-trial practice could amount to fundamental unfairness.

The due process clause of the Fourteenth Amendment, dealing as it does with "life, liberty and property", applies both to criminal and civil cases, and prohibits State authorities, counsel and judges from deprivation of such due process. If the Court should find on these facts that a State has so deprived this defendant of due process under such amendment, by so cautioning a witness, then it will have devious and untoward effects on all litigations as it is now conducted. It would mean that no counsel could safely caution a witness against volunteering uncalled for information, for the fear that such instruction might be a suppression of evidence. Ultimately, it would mean that the State, to be safe must investigate for the defendant and help him try his case, or run the risk of the defendant later claiming he was not aware of any particular evidence, and that such evidence was suppressed, irrespective of the question of diligence in preparing his own case. We do not think the Constitution contemplates any such absurd results.

Certainly, many thousands of cases could fall in this category; untold witnesses have testified strictly in answer to questions asked, leaving unsaid other

inadmissible facts within their knowledge. And certainly any number of defendants now in prison would be entitled to release for the same reason, if due process was deprived under these facts.

VII

Failure To Notify The Defendant Of Facts Which Are Discovered Is Not "Fundamental Unfairness," When Defendant Had An Equal Opportunty To Discover Those Facts.

A. The record shows nothing more than that the witness was cautioned not to volunteer uncalled for evidence before the jury. It does not show that counsel used any wilful fraud or deceit to hide any facts from the petitioner, or to misrepresent such facts to the court or jury.

B. The cases of *Dye*, *Baldi*, and *Ragen*, supra, set forth the following elements constituting fundamental unfairness:

1. Vital evidence bearing on guilt or penalty was within the *exclusive* control of the prosecution, not readily available to the defense in the exercise of due diligence. *Illustration:*

(a) *Dye:* policeman's opinion; (b) *Baldi:* ballistics expert's opinion on bullets; (c) *Ragen:* medical report of doctor that prosecutrix was not raped.

2. The evidence was *directly contrary* to the prosecution's position and other evidence offered in court. *Illustration:*

(a) *Dye:* State put officer on stand to prove defendant sober, keeping away the officer who said defendant was drunk; (b) *Baldi:* State claimed defendant fired fatal shot, knowing its own balistics

expert would testify to the contrary; (c) *Ragen:* State convicted defendant of rape, when medical report showed there was no rape.

3. The prosecutor made overt, fraudulent and deceitful representations to court and jury. *Illustration:* (a) *Dye:* prosecutor said other officers would corroborate first witness; (b) *Baldi:* prosecutor permitted court to charge jury that all witnesses had been called, and failed to answer defense request for bullets; (c) *Ragen:* the fact that there was a prosecution was a fraud.

4. The prosecutor, in view of above, failed to call such evidence to the attention of the court or counsel.

C. Therefore, did the prosecutor violate petitioner's right by his mere failure to disclose his knowledge in this case? The following facts will demonstrate that he did not.

1. It is undisputed that the state had filed its application to subpoena the witness Castilleja four days before trial; that such included his name, address, and telephone number; and that such records were available to counsel, had he asked the clerk to see them. (Original transcript, pp. 183-186)

2. Under Texas law, a defendant is entitled to request an "examining trial" before a magistrate any time before indictment. At such trial he may subpoena any and all witnesses and interrogate them under oath, as a means of *discovering* the facts in advance of the trial on the merits. Arts. 245-266, Texas Code of Criminal Procedure.

3. There is no showing but that when witness testified on the stand, counsel had full opportunity to examine him as to his relations with deceased.

However, counsel did not interrogate the witness either before, during, or after the trial, except to cross-examine him on the stand. (R. 55)

D. Petitioner has avoided the inevitable question: Had trial counsel seriously intended to base a defense on Castilleja's relations with deceased, why didn't he interrogate the witness? It was common knowledge (petitioner surely knew it) that the witness was the last to see deceased alive, and the only one present at the homicide, other than petitioner. What then prevented counsel from interrogating him and ascertaining all the facts? The answer is that *no one* prevented him from fairly ascertaining the facts; certainly the prosecutor did not. Petitioner says that he saw the witness dancing with his wife, and later kissing her at the time of the homicide. Yet on cross-examination counsel didn't even ask the witness if he was *kissing* the deceased at the time of the killing. Petitioner certainly had the right to corroborate what he claimed to see, yet on examining the only living partner to the alleged love tryst, he didn't even ask *if they had kissed.* (R. 156, 157) How anemic then is his claim that he was deprived of the opportunity to inquire about *intercourse* on prior occasions! Petitioner's transparent arguments do not conceal the glaring truth that springs from this record: *petitioner did not diligently exercise the right given him by the State of Texas, and now tries to blame the prosecutor for his plight!*

E. The prosecutor did not instruct the witness to refuse to talk to the defense. This court will never presume fundamental unfairness; similarly it can-

not presume from these facts that the witness, had he been contacted by the defense before trial would have falsified or concealed the facts. Therefore, the prosecution did not have the *animus* or intent that even petitioner's counsel had in instructing the same witness much later, to refuse to talk to the D.A.'s office while the writ hearing was pending. And petitioner's counsel considers such instruction *not to talk* is permissible. (See R. 112)

F. The element of active fraud and deceit is lacking here. The claim is made, that in taking the original statement from the witness before trial (Def. Ex. E, R. 124) without including therein the occasions of intercourse with deceased, amounted to an intent to suppress. But how could it? It was taken for the private reference of the prosecutor as a trial and investigative aid, and in no wise was it intended to be shown to anyone else. Had counsel called for the statement, had it been produced, and therefore an implied representation made that such was the complete knowledge of the witness, a different situation would exist.

G. Therefore, the failure to disclose, or to step forward and volunteer these facts, was not *of itself* fundamental unfairness. Due process is a concept of basic fairness. It was never intended to abrogate the exercise of ordinary diligence by the defense in the trial of criminal cases in State courts. Certainly, under the *Lisenba* case, supra, there was no absence of fairness which *fatally infected the trial*, nor did the prosecutor, in merely keeping his mouth closed, "*necessarily prevent a fair trial.*"

CONCLUSION

Respondent submits that petitioner has wholly failed to carry his burden of proving any denials of due process, and is not entitled to be discharged from his present custody. The findings of the lower court are manifestly correct, and respondent respectfully prays that the judgment be affirmed.

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that should such writ be returned to the Court of Criminal Appeals without the facts accompanying same, or without all of the facts deemed necessary by the Court of Criminal Appeals, said court may designate and direct any district judge or judges of this state to ascertain the facts necessary for proper consideration of the issues involved; and it shall be the duty of the official court reporter of the district judge or judges so designated to forthwith prepare a narration of the facts adduced in evidence upon any such hearing and transmit the same to the clerk of the Court of Criminal Appeals within ten days of the date of such hearing. And it shall be the duty of the district clerk of the county wherein the writ is issued to make up a transcript of all pleadings in such case and to transmit the same within ten days to the clerk of the Court of Criminal Appeals. Provided, that upon good cause shown, the time may be extended by the Court of Criminal Appeals for filing of such narration of facts or transcript.

"The clerk of the Court of Criminal Appeals shall forthwith docket the cause and same shall be heard by the court at the earliest practicable time. Upon reviewing the record the court shall enter its judgment remanding the petitioner to custody or ordering his release, as the law and facts may justify. The mandate of the court shall issue to the court issuing the writ, as in other criminal cases. After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner. . . ."

Art. 135, Texas Code of Criminal Procedure

"The writ of habeas corpus is intended to be applicable to all such cases of confinement and restraint, where there is no lawful right in the person exercising the power, or where, though the power in fact

exists, it is exercised in a manner or degree not sanctioned by law."

QUESTIONS PRESENTED

I

Whether the witness, Castilleja, committed perjury, knowingly used by the State prosecutor, which deprived petitioner of due process of law?

II

Whether the State prosecutor suppressed or concealed material evidence favorable to petitioner, which deprived petitioner of due process of law?

III

Whether petitioner has been deprived of due proces of law because the prosecutor advised the witness not to volunteer any evidence, but to answer truthfully the questions that were asked?

IV

Whether petitioner has been deprived of due process of law because the prosecutor knew before trial that the witness, Castilleja, claimed to have engaged in intercourse with deceased several times prior to the homicide, which was unknown to petitioner, and which facts were inadmissible under Texas law, and failed to divulge such knowledge to petitioner or his counsel?

STATEMENT OF THE CASE

Petitioner's Statement of the Case is objectionable in several particulars; hence, Respondent will make its own statement. In particular, the alleged quotation attributed to the prosecutor (Pet. Brief, p. 10, 11) is not supported by any reference to the record, nor can it be because it is not found in the record, and is believed to be a false quotation of the prosecutor.

Petitioner and his wife, Herlinda, were separated. In May, 1955, petitioner was placed under a peace bond for threatening his wife. (R. 173, 190). On the afternoon of June 18, 1955, the petitioner was drinking beer at a bar with a waitress, and, speaking of his troubles with his wife, said that she did not stay at home and care for the children, and that he was going to "give it to her." He also said that they would "read about me in the papers Monday." (R. 132, 133) After his wife refused a gift tendered by petitioner, he again told another waitress friend that he was going to "get even" with his wife, and then go to Mexico. That this he had decided to do. (R. 139) That same night, the witness, Natividad Castilleja, drove petitioner's wife from town and stopped in front of her home. As the car door opened, petitioner jumped from where he had been hiding, attacked his wife with a knife, and stabbed her some thirty-two (32) times over her entire body. He then ran Castilleja off and drove away in the car, later abandoning the body of his wife in another county. (R. 148-153, 162-165)

Upon his arrest, petitioner gave a confession, in which he states, "the reason I stabbed her was be-

cause she was going out and not taking care of the children." (R. 192) During the investigation of the homicide, a statement was taken from the witness, Natividad Castilleja, relative to his knowledge of the facts surrounding the murder. Def's Ex. E, R. 124) The statement was taken by Pete Torres, an investigator, and shown to Assistant District Attorney Roy Barrera. (R. 77) After completion of the statement, Castilleja admitted having had intercourse with deceased on several occasions prior to the homicide, but denied intercourse on the night of the homicide. (R. 44, 77) Castilleja then asked Barrera what he should say if asked about intercourse with the deceased on the trial, and Barrera told him that he should answer each and every question asked of him on the witness stand truthfully, but not to volunteer any information, and to answer only the questions asked of him. (R. 22, 48-49, 79)

At the trial, the witness Castilleja testified for the state, and in answer to questions, stated that he had given the deceased a ride home "about two times," that he had no dates with her, other than to take her home, and that they were not in love. (R. 142, 156) No questions were asked concerning sexual relations by either counsel.

Defendant testified of the separation from his wife, that she left him and the children for a while, that she went out and left the children at home, and that he had seen her dancing with men. (R. 157-161) On that night of the homicide, he said he had been drinking heavily and saw his wife drive up in front of the house with Castilleja. That he saw the two kissing, and so he started stabbing her. (R. 162-163) When asked if he killed his wife because she

was kissing Castilleja, he replied, "In a way, yes sir; and she wasn't taking care of the kids either." (R. 184)

The jury returned a verdict of guilty of murder with malice, and assessed the death penalty. The judgment and conviction was affirmed by the Texas Court of Criminal Appeals.

On February 14, 1957, an application for writ of habeas corpus was filed in the State District Court, alleging perjury, subornation of perjury, and suppression of evidence by the state.

At the hearing on petitioner's application, Natividad Castelleja was called as a witness by the petitioner. He testified to acts of intercourse with the deceased prior to the homicide, but denied intercourse on the night of the killing. (R. 7) He was not asked about intercourse with deceased upon the trial, and for this reason, did not testify concerning it. (R. 26) Castilleja further testifed that he had not committed perjury during the trial, (R. 21, 63) and that neither Barrera, Torres nor anyone else told him to lie or deny the truth on the witness stand about his sexual relations with the deceased. (R. 67) And he was told not to volunteer answers, but to answer truthfully all questions asked. (R. 48, 49)

In an effort to *impeach* his own witness, Castilleja, the petitioner then introduced at the hearing Def.'s Ex. "B", (R. 119, 9), "C", (R. 121. 15) and "D", (R. 124, 32), which were alleged affidavits of Castilleja taken by petitioner's counsel. The witness, Castilleja, repudiated portions of these statements, denied many of the assertions, and explained the circumstances under which they were taken. (R. 52, 69)

After hearing the evidence adduced, the Judge of the State District Court denied the application and remanded petitioner to the penitentiary. (R. 113) Thereafter, on March 13, 1957, after another hearing on application for a writ of habeas corpus, filed in the Court of Criminal Appeals of the State of Texas, upon the evidence adduced upon the hearing in the Criminal District Court No. 2 of Bexar County, Texas, the Court of Criminal Appeals entered an order denying the application and finding that the record "does not support petitioner's allegations." (R. 207)

The Court, speaking through Judge Morrison, also found specifically that:

> "Barrera advised Castilleja to tell the truth if he were questioned at the trial about such illicit relationship but not to volunteer any information unless he was asked.
>
> "It was not shown that any of the answers were untrue." (R. 207, 208)

It is such order denying the application for a writ of habeas corpus that the petitioner seeks to review in this Honorable Court.

SUMMARY OF THE ARGUMENT

1. Petitioner alleges a denial of due process, claiming that the witness, Castilleja (1) committed perjury at the trial, (2) which was knowingly used or suborned by the prosecutor, (3) that the prosecutor concealed evidence that said witness claimed to have had intercourse with deceased on occasions prior to the homicide. When he filed his application for writ

of habeas corpus in the State District Court, he received a full hearing at which testimony was taken concerning his allegations, and his application was denied. He next filed a similar application with the Texas Court of Criminal Appeals, which Court denied his application after a review of the record, and specifically found that he failed to prove his allegations. Such procedure was conducted pursuant to Article 119 and 134 of the Texas Code of Criminal Procedure relating to habeas corpus. Under such procedure the Court is fully authorized to review a claim of constitutional deprivation, and to void and set aside a judgment which is contrary thereto. See *Ex parte McCune*, 246 S.W. 2d, 171. The State of Texas, therefore, affords adequate corrective process in the case of constitutional errors, which process Petitioner exhausted in this case. He asks this Court now to review the findings of fact of the Court below, contrary to his allegations.

2. Essentially, this case involves a review of the factual record made below, to-wit, that Petitioner failed to prove prejury, subornation or suppression of material evidence. His burden is to produce "clear proof", and by substantial and credible evidence the facts that constitute a denial of due process. This he has failed to do. The witness, Castilleja, called as a witness to prove such denials, failed to substantiate perjury or that he had been instructed to falsify the facts. Petitioner's counsel then sought to impeach him by introducing several alleged written statements. In the first statement (Def. Ex. C), there is included a recital that the witness had been asked by Alcorta's lawyer at the trial whether he had in-

tercourse with the deceased, and that he replied that he had not, and that he knew he had lied. The witness on the stand, confronted with such statement, readily denied that he had ever made such admission, that no such question was asked at the trial, and, therefore, no such false answer was given. It is apparent from the trial record (R. 156, 157) that the witness was correct, and that no such question or answer occurred during the trial, notwithstanding the alleged statement being used by Petitioner's counsel. Counsel then called the prosecutor, and attempted to secure admissions that he had instructed the witness to deny the true facts or to conceal evidence. Instead, he proved only that the prosecutor had discovered that the witness had had intercourse with deceased on several occasions prior to the homicide, and considered such evidence inadmissible under State law, because such facts were unknown to the defendant at the time of the killing, and could not have motivated him. That he had instructed the witness to answer truthfully the questions asked, but not to volunteer extraneous information. Counsel then sought to impeach the prosecutor by offering news reporters who testified to "out of court" statements allegedly made by the prosecutor. In short, Petitioner relies mainly on the alleged ex parte statements of the witness and the testimony of the news reporters to establish his contention. However, the Judge properly ruled that such evidence was admissible only for impeachment purposes, and, therefore, such evidence under recognized authority has no affirmative or substantial value to prove Petitioner's contentions. Having

failed to prove perjury and subornation, counsel then construes certain answers of the witness as misleading or contradictory. Principally he argues that when he answered he was not in love with the deceased, that his answer amounts to perjury, since on prior occasions he had intercourse with deceased. But intercourse does not necessarily denote love between the parties; consequently, the witness answered to the best of his own belief, and did not intentionally falsify. The proof, therefore, is entirely insufficient, and Petitioner has not carried his burden.

3. This case, unlike many authorities cited by petitioner, is one in which a full hearing was accorded Petitioner, resulting in findings of fact against petitioner. The Court of Criminal Appeals found that the record "does not support petitioner's allegations", that "Barrera advised Castilleja to tell the truth if he were questioned at the trial about such illicit relationship but not to volunteer any information unless he was asked", and finally, "it was not shown that any of the answers were untrue". (R. 207, 208). Although this Court, on a constitutional question may not be bound by such State findings, nevertheless, they are entitled to great weight, and should ordinarilly be accepted. *Fay vs. New York*, 332, U. S. 261; *Gallegos vs. Nebraska*, 342, U. S. 55. Certainly, they are *not clearly erroneous* under the record in this case.

4. The evidence in question was not admissible under State law, and petitioner, therefore, was not prejudiced by failing to learn of it. It is established under repeated decisions of the Texas Court of Cri-

minal Appeals that prior acts of intercourse, or other bad conduct of the deceased, is not admissible when such conduct was unknown to the defendant at the time of the offense. The reason is that such unknown matters could not affect him, nor weigh upon his mind, nor enter into his motivation for the killing. *Lovett vs. State*, 223 S.W. 210, and other cases cited infra. The same is true even at the instance of the State, for the State is not permitted to show bad conduct of the deceased as a motive for the killing, where such is unknown to the defendant. *Phillips vs. State*, 2 S.W. 601. Petitioner argues that he is entitled to corroborate the facts to which he testified at the trial. However, he failed to testify that he had any knowledge, either personal or communicated, that his deceased wife had had intercourse with the witness. Therefore, under the authorities, there was nothing to be corroborated. Since the evidence was not admissible, which the prosecutor had compelling reason to believe under the authorities, the petitioner did not suffer fundamental unfairness. Nor would the prosecutor be expected to prove during the State's case, evidence which was clearly inadmissible.

5. The Federal cases cited by petitioner, such as *Dye*, *Baldi*, and *Ragen*, are all cases of an extreme nature where the prosecution has deliberately, openly, and fraudulently misled the Court and Jury by keeping out of the evidence completely, exhibits and testimony which were admissible and which would have proved the opposite of the theory of the prosecution. They are a far cry from the instant case where counsel had good opportunity, being apprized

in advance, to consult the witness even before, during or after the trial. He was never spoken to by petitioner's representative except during his brief cross-examination during the trial. He was a San Antonio resident, openly available for anyone wishing to talk to him. Such is quite different from the evidence and witnesses in the cited cases, which were under the exclusive control of the prosecution. Here also, the witness actually testified (contrary to the facts in the cited cases) and petitioner's present counsel is in effect complaining of petitioner's trial counsel's failure to ask the questions that he now deems appropriate. Dicta in the *Griffin* case has application only to Federal prosecutions, and did not relate to a due process question under the Fourteenth Amendment.

6. The Prosecutor here cautioned the witness to answer only the questions asked, but not to volunteer uncalled for information. It is submitted that such instructions are common practice among trial attorneys, and have an obvious and legitimate purpose. Certainly petitioner is not deprived of due process because a witness answers simply the questions that are asked. His counsel was present and had the privilege of asking all the questions he desired. That is the recognized procedure in conducting trials and petitioner has no right to expect a witness to blurt out or volunteer facts that are uncalled for. To hold that such instructions are violative of due process would be to adversely affect all litigation, civil and criminal as it is now conducted.

7. Since petitioner had every opportunity to discover the same facts which the State discovered, it

is not fundamental unfairness to fail to notify petitioner of the disputed evidence in this case. He had a right, prior to indictment, to request an "Examining Trial" where he could subpoena all witnesses and interrogate them in full. He knew or could have known, several days prior to the trial, that Castilleja, the only eye witness to the killing, was subpoenaed as a State's witness. The witnesses' address and phone number were attached to said subpoena records. And yet no efforts were made by the defense to talk to the witness, even before, during or after the trial. Subsequent developments indicate that the witness did not in any way conceal his knowledge, and freely collaborated with petitioner's present counsel in telling all he knew about the case. This Court cannot presume fundamental unfairness and certainly cannot presume that said witness would falsify, had he been asked questions regarding intercourse at the trial, or would conceal his knowledge, had he been interrogated prior to trial by petitioner's counsel. Under the *Lisenba* case there was no absence of fairness which necessarily prevented a fair trial.

ARGUMENT

I.

Texas Has Adequate Corrective Process to Correct Constitutional Errors, Which Process Has Been Fully Used By the Petitioner

The petitioner is here, after having exhausted the remedy of habeas corpus in the State of Texas. He first filed his application in the trial court where the

record of testimony was made, and there being denied his discharge, he filed an original writ in the Texas Court of Criminal Appeals, where it was again denied. Art. 119. *Texas Code of Criminal Procedure*, cited herein, p. 1.

Notwithstanding this, petitioner now claims in his brief, (p. 41) in an attempt to avoid the findings of that Court, that the State has denied him an adequate remedy to review constitutional errors, there being no "*coram nobis*" in Texas. He suggests that the Court of Criminal Appeals holds only that petitioner is without relief in this State. But such is not the holding of that court (R. 206-208), and such is not the law of Texas.

The habeas corpus procedure invoked by petitioner is entirely adequate to review any constitutional errors, and the Court of Criminal Appeals has full power to declare void a judgment which is volative of federal due process.

Art. 134, *Texas Code of Criminal Procedure*, provides:

> "The writ of habeas corpus is intended to be applicable to all such cases of confinement and restraint, where there is no lawful right in the person exercising the power or where, though the power in fact exists, *it is exercised in a manner or degree not sanctioned by law.*"

Counsel also overlooks the case of *Ex Parte Mc Cune*, 246 SW 2d. 171, where a petitioner sought a hearing before the Court of Criminal Appeals, by writ of habeas corpus under the said Art. 119, supra, and alleged similar grounds of conceal-

ment of evidence as a denial of due process. In addition, petitioner sought to reopen the judgment on the ground of newly discovered evidence. The court held that the latter was an attempt to exercise the common-law writ of *coram nobis*, which was not available in a Texas appellate court. However, the court fully discussed petitioner's constitutional contentions and held at p. 172:

> "There is no question but that this court not only has the power but it is its duty to prevent enforcement of a judgment in a criminal case obtained under circumstances and conditions which constitute a denial of due process of law. . . .
>
> We have examined the facts disclosed by this record, and have reached the conclusion that a *denial of due process to relator is not shown.*"

That is exactly what the court decided in the instant case. Petitioner, therefore, cannot escape the specific findings of fact made by the court, after a careful review of his constitutional contentions and the evidence to support them. The judgment was surely based upon a federal question which petitioner raised, for if it was not, but was based on a non-federal ground, then he has no business in this Court.

Petitioner alleged that his restraint was illegal in that the conviction was *void* on the ground of a denial of federal due process. (R. 197). He has made no claim that he was denied the right to make full proof of his allegations, and can now make no serious contention that the state's corrective process to review his contentions is inadequate. The fact of the matter is, that he has fully exhausted the state corrective

process, has suffered unfavorable findings of fact, now appeals those findings to this court. This case, therefore, will turn on the question of the sufficiency of proof made by petitioner of his extreme allegations, and the correctness of such findings.

II.

Petitioner Has Failed to Prove Purjury, Subornation of Perjury, or Suppression of Material Evidence

A. Petitioner alleges a denial of due process in that the witness, Castilleja, (1) committed perjury at the trial, (2) at the insistence of, or with the knowledge of the prosecutor, (3) who concealed material evidence favorable to petitioner. The burden is clearly on petitioner to establish the facts of the alleged constitutional deprivations. But he has failed to make adequate proof, as the Court below held.

Just what constitutes a denial of "due process"?

> "As applied to a criminal trial, denial of 'due process of law' is the failure to observe that *fundamental fairness* essential to the very concept of justice, and in order to declare a denial of it, the Supreme Court must find that the absence of that fairness fatally infected the trial, and the acts complained of must be of such quality as *necessarily prevent a fair trial.*" *Lisenba v. People of California*, 314 U. S. 219, 62 S. Ct. 280.

And what is the standard of proof required to show a denial of due process?

> "A criminal prosecution approved by the State should not be set aside as violative of due process

without *clear proof* that such drastic action is required to protect federal constitutional rights." *Gallegos vs. Nebraska*, 342 U. S. 55, 72 S. Ct. 141.

". . . it is incumbent upon petitioner in this proceeding, if he is to accomplish his release that he establish by a *preponderance of substantial, credible evidence* not only that perjured testimony was adduced upon his trial, but also, if such be the fact, that it was knowingly produced by the prosecuting officials." *Ex Parte Mooney*. 73 P. 2d 554, 560; cert. den'd 305 U. S. 598, 59 S. Ct. 61.

Petitioner has charged the witness and the prosecutor with very serious offenses. However, while making such extreme charges, he has nowhere pointed to any specific instance where the witness has lied, or made an intentional misstatement. In Texas, perjury is a false statement, deliberately and wilfully made, under the sanction of an oath, which must be a statement material to the issue on trial. *Art. 302, 303, Texas Penal Code.*

B. To understand this record, it is well to understand the events leading up to the petitioner's habeas corpus hearing. The witness in question was a nineteen year old Mexican boy with only a seventh grade education. On the trial of the case he testified truthfully, as will later be shown, to every question that was asked him. Following the appeal, affirmance, and imposition of the death sentence, there followed the usual efforts of friends of the petitioner to secure clemency from the State Board of Pardons and the Governor. From the hysteria which accompanied the repeated denials of clemency, execution dates, and

stays of execution, the events that followed are more understandable, though certainly to be condemned. The witness had casually mentioned to a friend that he had previously had intercourse with the deceased, Herlinda. The witness, a Catholic, was taken before a priest and told, in substance, to confess his guilt. He was also taken before a lawyer (petitioner's present counsel) who told him that he had committed perjury (which in Texas is punishable by death, if committed in a case resulting in the death penalty), but that he should not worry, since counsel, as his lawyer, would defend him. He was told further that it was his fault that Herlinda was dead, and that if Alcorta went to the chair, that his death would also be his fault and on his conscience the rest of his life. (R. 52, 69) Under these circumstances the three purported written statements of the witness were taken, identified in evidence as Def.'s Exs. B, C and D. Having so taken three statements from the witness as his "lawyer", counsel then instructed the witness not to talk to the District Attorney's office, nor to give the State any further statements, and in the event that he was contacted that he should call counsel for "advice".

On the writ hearing, when Castilleja was called as a *witness for petitioner*, he then had his first opportunity to testify openly, and readily repudiated the material portions of these statements, related the above manner in which they had been taken, and steadfastly denied that he had lied at the trial, or that anyone had told him to lie. Petitioner, realizing that the witness proved the very contrary of his

allegations, attempted to impeach him by the introduction of the Def.'s Exs. B, C and D.

At the outset, before examining the testimony in detail, we shall indentify the document which was the source, or the basis of petitioner's original accusations, so widely publicized. Petitioner has claimed below and in this Court, that the witness *admitted* perjury at the instance of State authorities.

In Def.'s Ex. C (R. 122), there is the following statement, attested to by petitioner's counsel, and purportedly made by the witness:

> "I was asked in Court during the trial whether or not I had had intercourse with Linda Alcorta and I said that I had not. I was asked this question by Alvaro Alcorta's lawyer and I knew I was not telling the truth when I said that I had never had intercourse with Linda Alcorta."

The above statement is completely false, as counsel must admit. Not only did the witness in testifying deny making such a statement to counsel (R. 42, 43), but a casual glance at his trial testimony (R. 156, 157) will disclose *that such a question was never asked, and such an answer was never given.* Such is the obvious result of counsel's insistence to the boy that he had committed perjury, and his over-zealous efforts to get him to "confess" it under oath.

C. With such background in mind, let us now examine the testimony on the hearing of the witness Castilleja, and the conclusions that follow therefrom.

1. *The witness testified truthfully at the trial:*

(R. 21)

"Q. Now, Natividad, did you tell the truth when you testified in the trial of Alvaro Alcorta?

"A. Yes, I did."

(R. 63)

Q. (Mr. Semaan continuing:) Isn't it a fact that you didn't admit having intercourse with Herlinda Alcorta, and Alvaro Alcorta's trial was bothering you and was on your conscience?

"A. It wasn't on my conscience, because I told the truth."

Castilleja repeatedly states that he told the truth to the questions asked (R. 28, 46); and that when the State's attorneys questioned him about his prior testimony, that he told them he had testified truthfully (R. 61).

Further, that if he had been asked the question, whether he ever had intercourse with Herlinda Alcorta, he would have answered the question truthfully (R. 27, 47).

Petitioner's brief is replete with statements that the witness Castilleja lied and committed perjury upon the trial, and that the prosecutor questioned the witness concerning intercourse, and received answers which he knew were untrue, and failed to inform the defendant that such testimony was untrue. Now, let's see just exactly how he goes about proving these extreme allegations. In his brief, page

14, he first admits that the witness was never asked the direct question as to whether he had had intercourse with the deceased, which is contrary to the purported statement which he took from the witness (Def.'s Ex. C., R. 122). He then quotes excerpts from the witness's direct examination, (1) where the witness states that he had given the deceased a ride "about two times" from where she was working to her house (R. 142), and (2) where the witness testifies that he and the deceased were not in love, had never talked about love, and had never had any dates with deceased, other than to take her home from work (R. 156). Petitioner says that such testimony is "contradictory", but nowhere points out an intentional or wilful falsehood.

On the writ hearing the witness testified that he had driven the deceased home, and had intercourse with her about four or five times (R. 7). Since he now testifies that such rides numbered "about two times", does this constitute deliberate perjury on a material matter? We think not. The witness is clearly attempting to make an estimate of the number of occasions, did not profess to set an exact figure, and furthermore, he explained (R. 19) that he had in his own mind a distinction between the times that he picked her up after her work and the times when she was not working, such as the night of the homicide that he described upon the trial. Certainly, where a witness, particularly a nineteen year old Latin American, who in some instances may experience difficulty in understanding and speaking the English language, attempts to estimate and recollect the number of rides he gave deceased, he does

not commit deliberate perjury when he says "about two times" on one occasion, and four, five or six times on other occasions. We think it ridiculous to expect the prosecutor to stand up and announce to the court and counsel that his witness has committed perjury, when such a minor discrepancy is found in this testimony. To show such a minor inconsistency in the witness' estimates is not to prove deliberate perjury as alleged. It cannot be argued that on the witness' testimony, taken as a whole, a different verdict would have resulted had he testified "about four, five, or six times" instead of "about two times".

Petitioner next argues that the witness lied when he answered in regard to "love", apparently taking the position that "love" is synonymous with sexual intercourse. Without any attempt to garnish the true facts, it is apparent that the witness claims to have indulged in illicit intercourse with the deceased. However, without being unduly technical, it seems rather naive to argue that a nineteen year old single boy, having illicit intercourse with the married mother of two children, is automatically "in love" with her, or vice versa. However venal a state existed between the two, it is entirely possible and the witness can be genuinely certain in his own mind, that a state of "love" did not exist. Many couples engaging in intercourse profess to share love; many, certainly those that are unmarried, do not profess love. Therefore, we submit petitioner has not convicted the witness of perjury on the above testimony.

The remaining statement, that he never had any dates other than to take her home, does not constitute perjury because of his admissions of inter-

course. He clearly stated that he had intercourse with the deceased, only on such occasions that he brought her home from town. (R. 20).

Therefore, counsel's statement that the witness "could not possibly have been telling the truth in both instances" is not supported either by the record, or by common logic.

2. The witness was instructed to answer all questions truthfully at the trial:

(R. 22)

"Q. What did they tell you with reference to admitting or denying your having intercourse with Herlinda when you took the witness stand?
"A. They told me to tell the truth."

(R. 48, 49)

"(Mr. Barrera continuing:) Natividad, do you remember what it was that I told you about your testimony in court if you should be asked about intercourse in court?
"A. Yes, I remember.
"Q. What did I tell you?
"A. Well, I had to tell the truth.
"Q. I see. What else did I tell you about your testimony in court?
"A. Not to volunteer anything that was not asked.
"Q. Not to volunteer anything not asked of you?
"A. That's right.
"Q. But to answer each and every question on the stand truthfully?
"A. That's right.

"Q. Did you do that?
"A. I did."

(R. 67)

"Q. Now, you say that no one in the District Attorney's Office, Mr. Barrera or anybody else, told you to withhold any evidence about having intercourse with this girl, or to deny it, or not to admit, or anything like that; you say no one told you that?
"A. Nobody." (He gave the same answer at p. 51)

3. *The witness did not testify as to intercourse because he was not asked about it:*

(R. 26)

"Q. All right. Now, Natividad, why didn't you say in court, in the trial of Alvaro Alcorta, why didn't you tell about all these acts of intercourse you had with her?
"A. Why didn't I say it? Well, I wasn't asked.
"Q. Is that your only reason?
"A. Well, yes, because they told me not to volunteer. I wasn't going to volunteer anything they didn't ask me."

(R. 23)

"Q. Well, was it because they didn't ask you, or because Mr. Barrera suggested to you that if you don't want to tell it, you don't have to?

"A. He told me not to volunteer anything they didn't ask me.
"Q. They told you not to volunteer?
"A. That's right.

"Q. And that's why you didn't say it?
"A. Well, because they didn't ask me."

4. *The witness contends he did not have intercourse with deceased the night of her death:*

(R. 7)

"Q. Did you have intercourse with her that night?
"A. No, I didn't.

. . .

"Q. Now, having seen this, I'll ask you again whether or not you had intercourse with Herlinda Alcorta the night she died.
"A. No, I didn't. I had it before, but not that night."

Further, he did *not* tell state authorities that he had intercourse on that night. (R. 44)

5. *The witness repudiated the material portions of the statements introduced to impeach him:*

He repeatedly denied telling petitioner's counsel that he had intercourse the night of the killing. (R. 8, 15, 41, 45)

He denied telling petitioner's counsel that he was asked about intercourse at the trial, and that he testified falsely. (R. 42, 43, 44)

It is obvious from the testimony of the witness, Castilleja, taken as a whole, that he told the truth at the trial to the best of his ability, and that he was never told to deny any facts. As a matter of fact, there is no credible evidence to the contrary. At some

portions in the record petitioner confuses the advice given the witness, should someone question him at *home;* with the advice given as to testimony at the *trial,* and inferring that the witness was told "he didn't have to answer the question." But by now it is quite clear from the record that the witness was instructed and understood that he must answer *all questions truthfully at the trial,* but could exercise his own judgment as to whether to discuss the facts with other persons *before the trial.* (See R. 22, 78, 79.)

6. *Petitioner is bound by the answers of Castilleja when he testified at his instance on the writ hearing in open Court.* The alleged written statements of Castilleja were introduced solely for the purpose of impeachment, and the Court so limited them. (R. 9, 15, 32) Even if they *are prior* inconsistent statements, and in fact serve to impeach the witness, they are not usable as substantive evidence.

> "Under the almost universal practice, well established in Texas, such statements cannot be used as substantive evidence of the truth of the facts stated . . . moreover, if the only evidence of an essential fact is such a prior statement, the party's case will fail for lack of proof." *McCormick & Ray, Texas Law of Evidence,* Sec. 688.
>
> See also: *3 Wigmore, Evidence, Section 1018; Bridges vs. Wixon,* 326 U. S. 135, 150; 65 S. Ct. 1443.

However, the witness denied stating the material matters in the purported affidavits, and thus created

an issue as to whether he in fact uttered prior, inconsistent statements. (R. 8, 15, 41, 42, 44).

Petitioner in his brief (p. 40) claims the right to impeach the witness as he was "hostile, adverse, and unfriendly." But this is not so. He called the witness without any reservations, to prove the truth of his allegations. (R. 1) He was armed with a battery of alleged statements he personally had taken from the witness, having promised the witness he would defend him from perjury charges. (R. 69) He further instructed witness not to give the State any affidavits, but to see him for "advice" when questioned, which instructions the witness observed. (R. 52, 69) The contrary is apparent, therefore, that such witness became adverse only after he testified in open court, but on past performance was clearly "friendly" when he was called. It was, under their arrangement, an instance of a witness called to testify by his own attorney or confidant.

That his testimony was adverse to petitioner, does not remove its probative force. If petitioner could impeach, he could not do so under the rule concerning an *adverse* witness or party, but only on the ground of *surprise*, where one *is* permitted to impeach his own witness. But, whether bound by the testimony or not, as a matter of law, it still remains as credible evidence which negates the bulk of petitioner's contentions, and the impeaching evidence can have no substantive or probative force whatever in proving his contentions.

D. Petitioner next called the prosecutor, Roy Barrera, and sought to force him to admit making a particular statement before the Board of Pardons.

Being asked in regard to the purported statements before the Board, that in his opinion the evidence in question was not admissible, Barrera replied,

> "A. I told him that in addition to the proposition which is not in there, that he should not and must not volunteer any information unless a question was asked of him; in which event, certainly, he had to tell the truth.
> "Q. All right. You told him not to volunteer that?
> "A. That's correct.
> "Q. Unless it was asked of him?
> "A. That's correct." (R. 72, 73).

On being asked if he had told the defendant that the testimony given was not true, Barrera replied:

> "A. The testimony I heard from the witness stand, insofar as I heard and insofar as that record reflects, *was true.*
> "Q. As far as you're concerned.
> "A. That's true, and insofar as the record is concerned." (R. 76).

Barrera further testified that he told the witness not to volunteer *any* testimony, whether of intercourse or otherwise. (R. 79).

E. Not being satisfied with the prosecutor's testimony, petitioner then sought to *impeach him* by the testimony of news reporters who were present at the hearing before the Board of Pardons. The witness Stewart Long (R. 82) testified that Barrera admitted that he was the one who cautioned the witness Castilleja, that he had stated his opinion as to the inadmissibility of the evidence. He admitted hearing

Barrera's full statement to the effect that he instructed the witness *not to volunteer* any information, and to answer each and every question *truthfully* on the stand.

Next, the reporter Van Slycke testified to fragments of the Board proceedings that he heard. He admitted that his handwriting was a little vague in his notes, and admitted omitting certain qualifying statements of Barrera. (R. 85, 86). He explains his inability to report Barrera's full statements, by saying, ". . . . for my news reporting I did no think they were important. They may be important in a legal sense." It is on such sorry evidence the petitioner relies to show a denial of constitutional rights and void a state conviction. See Petitioner's Brief p. 39.

Petitioner's intent is obvious from reading both news reporters' testimony. That is, that he was attempting to use some unidentified story in the local newspaper as the source of the purported admission by Barrera. Needless to say, the garbled and admittedly fragmentary testimony of the news reporters by referring to sketchy notes made some weeks before, (i. e., R. 90) and allusions to a newspaper article, all offered for the purpose of impeaching Barrera, if it does, and being hearsay based on hearsay, does not rise to the dignity of substantive evidence required to disturb a judgment of the State court on constitutional grounds.

The investigator, Pete Torres, testified for the State as being present when Barrera was conversing with the witness Castilleja. He took the original statement (Def.'s Ex. E, R. 124) from the witness in writing. (R. 98, 99) After completing the state-

ment he contacted the prosecutor, Barrera, suggesting further questioning in regard to his relations with the deceased. The witness then admitted intercourse on several prior occasions, but denied intercoure on the night of the homicide. Then the witness asked what to do if someone came to his *house* to see him. The witness was then instructed by Barrera as to his rights, that he could or could not discuss the case with them, as he chose. He also explained how his credibility could be damaged if he gave an additional written statement. The witness then asked, "What shall I say in court?" The prosecutor replied, "Whatever they ask you in court, tell the truth to whatever they ask you in court, but don't volunteer anything unless they ask you." (R. 100; also Barrera at R. 79)

Torres further testified that he contacted the witnes on January 25th, when a story appeared in the newspaper to the effect that counsel had taken a statement from him. (R. 102). He told Torres that he was warned that Alcorta's death would be on his conscience unless he did something about it, and that's why he gave the statement. (Def.'s Ex. C). On being asked to give the State a statement, correcting matters that had been reported in the paper, he replied that he thought not, since the attorney had instructed him not to. (R. 104)

It is significant to note the persons that petitioner did not call to testify. He did not call Mr. E. P. Lipscomb, who was present (R. 1) and who was petitioner's *original attorney on the trial* of the case. Consequently, there was no testimony that Lipscomb was unaware of Castilleja's testimony, or that he made any efforts whatsoever to speak to the witness be-

fore, during, or after the trial, to ascertain his knowledge of the case. Lipscomb offered no rebuttal to the testimony of Castilleja, that Lipscomb had never at any time sought to discuss the case with him (R. 55). Nor was there any testimony that had he known of the disputed evidence, that he would have offered it into evidence, or that he considered it material to any defense.

Petitioner did not call Father Duffy, Ascencio Castilleja, Alex Coy, or any other purported witnesses to the written statements taken by counsel, to support them after Castilleja repudiated them. Counsel himself was the only one who testified in support of them.

Petitioner is forced to stand on hearsay, ambiguous reports of so called "admissions" by the prosecutor, and portions of ex parte statements offered for impeachment, and then repudiated by the witness. Such is a far cry from the "clear proof", by a preponderance of "substantial and credible evidence", required to void a state conviction. His most frequent contention is that his case is proved by those who, with admitted inaccuracy, profess to report the out of court utterances of the prosecutor. But as already shown, such hearsay on hearsay, offered for impeachment purposes is incompetent to prove anything, and a case which rests on such evidence must fail.

The petitioner also attributes devious and underhanded motives to the prosecutor in asking the witness Castilleja the questions concerning "love". The questions were asked merely to elicit from the witness a lack of prejudice against the defendant and the removal of the motive on the part of the witness to give false or colored testimony.

These questions were asked immediately prior to the witness being passed for cross-examination and at a time we must assume that the defense attorney was fortified with knowledge imparted by the defendant that he, the defendant, had observed the witness and the deceased "kissing and hugging" each other. It is only reasonable and common-place to assume that the defense would develop the relationship that existed between the witness Castilleja and the deceased Herlinda Alcorta, had they intended to defend on such grounds. And in the absence of such development we must assume that the defense attached no importance to it and was defending on *other* grounds.

III.

The Factual Determination By The State Court Is Entitled To Weight.

Certainly, by a careful review of the entire testimony at the hearing, it is impossible to find any substantial evidence of wilful perjury, of subornation of perjury by the prosecutor, or improper "suppression". The Texas Court of Criminal Appeals found that, "The record of said hearing is before us and it does not support petitioner's allegation, nor is it shown therein that the conviction is void, as alleged." (R. 207) It also found as a fact that, "Barrera advised Castilleja to tell the truth if he were questioned at the trial about such illicit relationship but not to volunteer any information unless he was asked." and further, that, "It was not shown that any of the answers were untrue." (R. 207, 208) The above

findings of the Texas Court, based upon briefing, argument, and careful examination of the written record, is entitled to *great weight* by this Court. Such is the holding of *Fay v. New York*, 332 U. S. 261, 67 S. Ct. 1613. Also see *Gallegos v. Nebraska*, 342 U. S. 55, 72 S. Ct. 141, wherein the Court holds at p. 60:

> "While our conclusion on due process does not necessarily follow the ultimate determinations of judges and juries as to the voluntary character of a defendant's statements prior to trial, the better opportunity afforded to State agencies to appraise the weight of the evidence, because the witness gave it personally before them, *leads us to accept the judgment insofar as facts upon which conclusions must be reached are in dispute.*"

The Court there further held that it would examine the *undisputed facts*, but said (p. 61):

> "As State Courts also are charged with applying constitutional standards of due process in recognition of their superior opportunity to appraise conflicting testimony, we give deference to their conclusions on disputed and essential issues of what actually happened."

Respondent does not say that this court is bound to view the record in the same manner as did the state court, nor must it accept the findings of fact in all cases. However, we do say that the matter is largely one of sifting the testimony of a number of witnesses, analyzing alleged contradictions and separating that evidence which has substantive value from that

which has none. The district judge who heard the testimony on the hearing, who observed the witnesses as they testified, and formed opinions as to their credibility, had to make such a determination, and did so against the petitioner. The Court of Criminal Appeals, in reviewing the record and applying the law had to make the same determination. This is not an original proceeding in the Supreme Court, nor an original proceeding under any of the federal statutes, but rather it is to *review* the judgments of the state courts. Therefore, it is submitted that in observing the comity between state and federal government, while at the same time exercising its prerogative of review over constitutional questions, this court should give great weight and consideration to the *factual findings* made below. And unless they are clearly erroneous under this record, they should not be overturned.

And, as they are not without factual foundation, they should be accepted. *Fay Roofing Co. v. Wood*, 344 U. S. 157, 73 S. Ct. 204.

The constitutional rights which override all other questions, have been carefully guarded through the years, and sparingly exercised to strike down the deliberate judgments of state courts. Therefore, such a privilege should not be prostituted by invoking these beneficent provisions in a state of facts so unsatisfactory, so weak and so lacking in probative force as the petitioner has here presented. It must not be forgotten that petitioner is not the only person who has rights in this matter. The witness, Castilleja, and the prosecutor have been accused of extremely seri-

ous, and even felonious offenses. They must not be "convicted" of these charges by mere speculation, insinuation, and other matters not amounting to credible evidence.

IV.

The Evidence In Question Would Not Have Been Admissible Under State Law, and consequently petitioner's failure to learn of it could not constitute fundamental unfairness.

A., *Evidence of the witness' prior acts of intercourse with the deceased was immaterial and inadmissible, where such acts were unknown to the defendant at the time of the killing.* Petitioner in the proceedings below and even in this court has taken two contradictory positions. First, he alleges that such acts were unkown to the defendant at the time of trial (R. 7); and secondly, he alleges at least in a general way, that petitioner was aware of his wife's conduct with the witness Castilleja at the time of the killing. Of course, there is reason for such inconsistency, since in properly alleging a constitutional question, he must say that such evidence was unknown at the time of the trial, and the State failed to apprize him of it. However, on the question of materiality of evidence on the trial, he must say that such facts were known to petitioner and, consequently, entered into his state of mind at the time of the killing and was, therefore, admissible.

Petitioner creates his own dilemma: If he knew about this evidence in advance, then as a matter of law there can be no suppression or concealment of it which prevented a fair trial.

However, the record unquestionably shows that petitioner was not aware that deceased had had sexual relations with Castilleja on several prior occasions, in accordance with petitioner's statement of the "Questions presented". (Petitioner's Brief, 7), and similarly reflected in petitioners original Appli cation for Writ of Certiorari, page 3, that such information was "unknown to the defendant at the time."

The Supreme Court has held that State rules of evidence shall prevail in determining such constitutional questions as are presented here. *Gallegos v. Nebraska*, supra; *Griffin v. United States*, 336 U. S. 704, 709; 69 S. Ct. 814.

The Court of Criminal Appeals of Texas has consistently held that such prior acts of intercourse, or of infidelity, or other bad conduct by the deceased, is inadmissible where such actions and conduct were unknown to the defendant at the time of the offense, and hence, could not have contributed to his motivation or state of mind. *Meyer v. State*, 41 S. W. 632 (Tex. Cr. App.); *Young v. State*, 127 S. W. 1058 (Tex. Cr. App.); *Hall v. State*, 158 S. W. 272 (Tex. Cr. App.); *Weige v. State*, 196 S. W. 524 (Tex. Cr. App.); *Perea v. State*, 227 S.W. 305 (Tex. Cr. App.); *Lovett v. State*, 223 S. W. 210 (Tex. Cr. App.); *King v. State*, 286 S. W. 231 (Tex. Cr. App.); *Newchurch v. State*, 121 S. W. 2d 998 (Tex. Cr. App.); *Lacy v. State*, 128 S. W. 2d 1165 (Tex. Cr. App.)

It is apparent from the defendant's testimony on the trial that the acts of intercourse between the witness Castilleja and defendant's wife were unknown to him. The defendant testified on the trial that although he had seen his wife dancing with Castilleja

on a previous occasion, that this did not mean that there was anything wrong, and he had to be sure. He said he had never seen them do anything wrong until the night of the homicide, when he "saw them there" kissing, and more specifically, in answer to a question on cross-examination, he testified that he killed his wife, in a way, because she was kissing Castilleja and because she wasn't taking care of the children either. (R. 183, 184)

In *Young v. State*, supra, the Court held that where the accused killed deceased on his first meeting with him after learning of his insulting conduct toward wife of the accused, evidence of the criminal relations between the wife and deceased not known to the accused was inadmissible.

The case of *Weige v. State*, supra, stands for the proposition that matters of which the defendant had no knowledge are inadmissible,, where it is sought to use such matters as having affected defendant's mind at the time of the homicide, the Court specifically holding:

On page 525:

> "We doubt the admissibility of this evidence (that appellant's father had had relations with appellant's wife, the deceased) under the circumstances. The rumor would manifestly not be admissible unless appellants' knowledge of it was proved by direct or circumstantial evidence . . . Where known to a defendant in a criminal case, and where they relate to relevant matters, they may become admissible, and in this case we think would be admissible, *if knowledge of their existence on the part of appellant was satisfac-orily shown in evidence. . .*"

In *Perea v. State*, supra, the facts showed that the defendant killed two hunting companions. Upon his trial for killing the woman companion, he defended partially on the ground of sudden passion amounting to manslaughter and sought to show illicit relations between the woman and man companions whom he had killed as showing his state of mind in viewing alleged threats on the part of the deceased. In this case, the Court held the evidence inadmissible and irrelevant, stating that the defendant did not claim to have *had any knowledge* regarding such illicit relations between his companions, nor were such relations referred to prior to the killing, or that he claimed he was influenced to kill the woman by reason of such facts.

In the case of *Lovett v. State*, supra, from the facts it appears that the daughter of the appellant, just before her father shot and killed the deceased, informed her father that the deceased had outraged her and had had intercourse with her. This was the extent of the information she conveyed. The State undertook to go into all incidental matters and invironments that occurred between the daughter and the deceased. In holding that the evidence was inadmissible, the Court of Criminal Appeals of Texas stated:

On page 211:

> "We are of the opinion that the State ought not to have been permitted to go that far under the circumstances of this case. *Matters unknown to the defendant could not affect him, nor weigh upon his mind, viewed from the standpoint of adequate cause and sudden passion.* The things which are known and which enter into the adequate cause which produce passion are proper

subjects of inquiry, *whether they tend to enhance passion or minimize it.* It is the condition of the defendant's mind at the time he acts, and the cause which produce that condition of mind, that enable the jury to view it from the defendant's standpoint. It is from this viewpoint he acts."

In *King v. State*, supra, the Court of Criminal Appeals affirmed the exclusion of evidence showing acts of criminal intimacy between the defendant's wife and the deceased in the absence of a showing that these matters had been *brought to the attention of the appellant prior to the homicide.*

The case of *Newchurch v. State*, supra, held that the trial court properly excluded testimony of prior indecencies of the deceased toward the defendant's daughter where the deceased's conduct was unknown to the defendant, the Court stating:

At page 1000:

"We do not believe that the testimony was admissible for the reason that *if he had no knowledge thereof*, it had no bearing on the appellant's state of mind and could not have induced him in any way to commit the act."

The case of *Lacy v. State*, supra, disposes of petitioner's contention that the evidence of intercourse would be admissible to corroborate his testimony that they were kissing. In this case, the Court held:

On page 1170:

"In order to show what was operating on his mind the appellant had the right to offer matters corroborative of the statements made to him by Beasley, but certainly had not the privilege of

> going into *certain details of such transactions* as were not known to him at the time of the claimed duress; but he should have been held only to such matters as were operating on him at the time of the exercise of such claimed duress by Beasley . . ."

In Alcorta's case, he could corroborate those matters known or communicated to him (such as dancing with men, going out and leaving the children); but could not corroborate those "certain details of transactions" unknown to him (such as prior acts of intercourse).

B. Not only is such evidence inadmissible on behalf of the defendant, but *it is also reversible error for the State* to attempt to show indiscretions of the deceased, as a motive for the killing, where such indiscretions were unknown by the defendant.

In *Phillips vs. State*, 2 S. W. 601, the Defendant had killed his wife, and the State was permitted to prove that the deceased was not virtuous, and that she was unfaithful to the defendant, her husband. Objection was made on the ground that knowledge of such indiscretions was not brought home to the defendant. The Court reversed and remanded, holding:

> "For the single purpose of showing motive, the evidence was admissible, if it was accompanied with proof satisfactorily showing that the defendant, at the time of the murder, had knowledge of the improper conduct of his wife. It was not admissible for any other purpose, not even for this purpose, unless a knowledge of the facts by the defendant before the murder was shown to exist. *Unless such knowledge was*

shown; such evidence was wholly foreign to the issue, was manifestly irrelevant, and should have been excluded."

To the same effect is *Black v. State*, 198 S. W. 959.

This disposes of petitioner's contention that the prosecutor had the duty of proving to the jury the deceased's sexual indiscretions with Castilleja, which were unknown to the defendant at the time of the killing. It is evident that the rule of exclusion works both ways. In other words, since such indiscretions, unknown to the defendant, could not, therefore, affect his state of mind at the time of the killing, such evidence is inadmisisble on behalf of the defendant to show mitigation, or on behalf of the State to show motive, where motive may otherwise be lacking. And as stated in the *Lovett* case, supra, such unknown matters would serve neither to enhance passion, nor to minimize it.

It is evident that the defendant could have defended on a number of grounds, to-wit: insanity, temporary insanity, or that death resulted from the rock thrown by Castilleja, as the defendant in fact contended in his testimony. Therefore, for the State to have proved at the outset that the deceased had been unfaithful to her husband, without showing his knowledge, could have been extremely prejudicial and harmful to the defendant, since it would tend to show premeditation, design and reason, for an intentional, voluntary, and malicious killing. It would not, therefore, be reasonable to hold that the failure of the State to introduce the evidence amounts to unconstitutional suppression of evidence, where under State law such proof would constitute reversible er-

ror. We think the prosecutor, in warning the witness not to blurt out involuntarily such inadmissible matters, did not violate any duty, but rather discharged a high duty in following the law as he understood it, and protecting the record from inadvertent reversible error. It is of little moment, now, for the petitioner, represented by different counsel, to claim that such evidence would have benefited him. The fact remains, judged at the time of the actual trial, that petitioner's trial counsel might well have objected to the evidence, for it was objectionable, to the State's showing a strong motive entirely inconsistent with possible defensive theories.

C. The case of *Thompson v. State*, 29 S. W. 2d 343, which is the only case cited by the petitioner in support of his contention that the evidence was admissible, is readily distinguishable from the instant case on the ground that, in the Thompson case, *the defendant sought to prove the truth of a fact known to him which had been communicated to him prior to his action.* This knowledge in the defendant distinguishes the Thompson case from the case at bar.

The holding of the *Thompson* case is limited to proof of the truth of the "matter relied upon by him in mitigation" under the issues present in that case. In that case the witness Hemphill testified of a conversation with deceased that deceased had ruined another girl, that he was now going with defendant's daughter, and intended to separate her from her husband. Evidence had already been admitted to the effect that Thompson knew that the deceased had made the Buckley girl pregnant. This, says the court, was admitted apparently without objection to show the defendant's state of mind and the fact that

his married daughter was keeping company with a man of such low morals. When Hemphill testified of his conversation with deceased, which was *conveyed to defendant*, he was vigorously cross-examined, and the State contended that his testimony was a fabrication. Under such circumstances, the court held that the defendant was entitled to the testimony of the Buckley woman, to the effect that she was *in fact* pregnant by the deceased. The court said, "If the communication to appellant of the fact of Miss Buckley's pregnancy by deceased was admissible, as seems to be conceded, and we think correctly so, then it would logically follow that corroborative evidence tending to prove its truth was likewise admissible if and when an issue arose as to its truth, or as to the fact of such communication being made. (29 S. W. 2d. 344

In this case, there is no evidence of any communication to petitioner that his wife was having relations with Castilleja, consequently, there was no issue as to the truth of the facts in such communication and no issue as to whether such communication had in fact been made.

D. The evidence is not admissible by virtue of Article 1257a, Penal Code of Texas, cited in petitioner's brief. Such statute is merely a permission to offer relevant facts concerning the previous relation between the *accused* and the deceased, together with other facts showing the "conditon of the mind" of the accused at the time of the homicide. It does not purport to change the otherwise established rules of evidence as to what is admissible in showing state of mind. *Wheeler v. State*, 239 S. W. 2d. 105; *Scott v.*

State, 190 S. W. 2d. 828; *Childress v. State*, 202, S. W. 2d. 930; *Howard v. State*, 55 S, W. 2d. 1048.

E. Petitioner infers that such evidence might be admissible because the State first opened up the matter by calling the witness Castilleja to the stand, and asking the question shown by the record (Petitioner's Brief, 28-29). However, this forms no predicate for the admission of the evidence in question. If we assume, as the above cases have held, that the prior relations of the witness and deceased, unknown to defendant, were immaterial, then the questions by the State as to whether the witness was "in love" with the deceased, etc., was also immaterial at that point. The Texas cases hold that the introduction of such immaterial matters by the State without objection does not form a predicate for the admission by the defendant of additional evidence of the same character. *Howard v. State*, 55 S. W. 2d. 1048 and *Scott v. State*, 20 S. W. 2d. 426, the latter case holding:

> "Where the defendant on trial fails to object to immaterial and prejudical testimony, he may be estopped to afterwards contradict it. *He cannot thus make an issue of an immaterial matter which had no proper place in the trial.*"

The evidence in question was clearly inadmissible, and under the law of Texas, above discussed, the prosecutor had every good reason to believe that it had no place in the trial, either for the State or for the defendant, and therefore his cautioning of the witness not to volunteer inadmissible testimony did not constitute fundamental unfairness. It was not a material matter under the Federal cases cited by

petitioner, and petitioner was therefore deprived of nothing that he would have been entitled to had he known of the evidence. There is no good reason to grant petitioner a new trial, since upon a new trial this evidence would not be admissible.

V.

The Federal Cases Cited By Petitioner Concerning Due Process Do Not Govern The Facts In This Case.

The petitioner has simply quoted at length selected portions of the federal opinions cited, without discussing the facts upon which said opinions were based.

As stated herein, the respondent does not question the rule of law decided and enuciated in the landmark case of *Mooney vs. Holohan*, 294 U. S. 103.

There, the Supreme Court simply held that petitioner had failed to invoke the State court remedy of habeas corpus and denied leave to file his petition for an original writ of habeas corpus in the Supreme Court. But the Attorney General had demurred to the application, in substance admitting the truth of the allegations, and denied that a Federal question was presented. The Court, however, held by way of dictum, that the requirements of due process were broader than that contended by the Attorney General, and would invalidate a conviction which was contrived by State authorities with the knowing use of perjured testimony, deliberate deception, and suppression of material evidence. The petitioner, Mooney, later filed his application for a writ in the California Supreme Court, and it was denied on the

ground that he failed to prove his allegations. *Ex Parte Mooney*, 73 Pac. 2d 554, cert. den'd, 305 U. S. 598, 59 S. Ct. 61. The proof showed that the principal witness, long after trial, executed an affidavit repudiating his testimony. Petitioner alleged that the witness called counsel's office, stated he had perjured himself at the District Attorney's direction, and thereupon executed the affidavit which constituted one of the principal "props" supporting petitioner's case. Such facts, and the Court's comment, strikingly resemble the background in the instant case. The Court said :

> "Subsequent developments tend to indicate that McDonald's "voluntary" decision to purge himself was induced or at least influenced by circumstances that cast suspicion thereon." (Page 563)

The Court on abundant evidence, rejected such repudiation, and found that said witness had told the truth at the trial, even though he later testified that he had committed perjury. The Supreme Court there denied certiorari on the state court's findings. How stronger is the instant case, where the witness does not stand on his affidavit of repudiation, but testified that he had told the truth consistently, and has never admitted perjury.

The case of *United States Ex rel. Thompson vs. Dye*, 221 Fed. 2d 763, is an extreme case on the facts, where a writ of habeas corpus was granted. There, the Circuit Court found that the District Judge erred in holding the evidence was not vital to the defense. The issue was one of intoxication of the de-

fendant, which if true, could have reduced the charge to second degree murder, and be material to the penalty under State law. The prosecutor called only one police officer to testify to the defendant's condition, which witness emphatically denied that defendant was drunk. The prosecutor then excused another officer, Heagy, knowing that Heagy would testify that defendant *was* drunk at the time of his arrest. He then compounded such deceit, by openly stating to the court that such State's absent witnesses would only corroborate the other State witnesses. On such extreme facts, Judge Hastie cautioned that "no unduly broad implications be read into this decision", and stated that "this is an area in which the question of fundamental fairness depends so much upon the facts of the particular case that a precise rule cannot be devised."

In *United States Ex rel. Almeida vs. Baldi*, 195 Fed. 2d 815, the Circuit Court affirmed the granting of a writ of habeas corpus on the ground of deliberate suppression of evidence, vital to the defense. The facts showed that a policeman was killed during a robbery attempt by several armed robbers. The State introduced evidence to show that Almeida fired the fatal shot, and the defense sought to establish by cross-examination that someone else, possibly a policeman, fired the shot. The jury found him guilty, and assessed the death penalty. The State did not put in evidence known proof that defendant was armed with a .45 caliber weapon, and that the deceased was killed with a .38 caliber bullet. The prosecutor did not call the various police officers and experts familiar with the evidence of the bullets, al-

though the jury was charged, under Pennsylvania law, that the prosecutor had called, "all the witnesses that he could find." Counsel alleged that this evidence could not have been obtained without the help of the prosecution, that they had inquired of the prosecutor as to whether other bullets had been recovered, and no reply was forthcoming. Consequently, the prosecutor deliberately proceeded with the trial on the theory that defendant had fired the fatal shot, which fact he knew from his own policeman was false. Furthermore ,the Court based its decision, in part, upon the want of discovery procedures available in Pennsylvania. The Court said:

> "It must be borne in mind that in Pennsylvania there is no discovery in a criminal case and we are of the opinion that his counsel cannot be justly accused of lack of *due diligence* in failing to find sources of evidence and evidence so well concealed."

Such is certainly not the case in Texas, where a defendant has the opportunity of discovering the knowledge of all witnesses, by the examining trial procedure, discussed infra, page 56.

The Court further commented on the State court's refusal to grant the writ, when the Court took no testimony and made no findings, saying, "Under such circumstances the allegations of the petition that vital evidence 'was wilfully concealed' *must be taken to be true* since no hearing was had." In the instant case, a full hearing was had, after which the

Texas Court of Criminal Appeals refused the writ, upon specific findings that the factual record did not support the allegations. Certainly, under the extreme facts above, the Court had no alternative but to grant the writ, assuming the allegations were true, the evidence showing that another, not the defendant, had killed the deceased. It rather demonstrates a case of deliberate suppression of evidence, wholly unavailable even to diligent counsel, and constituting a fraud on the court. Such is entirely distinguishable from the instant case which concerns facts within the knowledge of a lay witness, who did testify, and who was equally available to petitioner's counsel in ascertaining such facts. (See argument, p. 55.)

The case of *United States Ex. Rel. Montgomery vs. Ragen*, 86 Fed. Sup. 382, by a District Court, is a decision no one can dispute. There a Negro was convicted, and served twenty-five years in the pen for the rape of a white woman. This took place in the heyday of the Ku Klux Klan, when the defendant was prosecuted amid a background of threats, physical violence and intimidation of his own trial attorney. The prosecutrix was a mental deficient, and who stated that she had never before seen the defendant. The State had in its possession evidence of a medical examination of the prosecutrix, which showed that she was still a virgin, and was not raped. The awful result was, that defendant was convicted and sentenced to life imprisonment, for a crime *that was never committed!* The Judge, therefore, uses understandably strong language, which is cited ex-